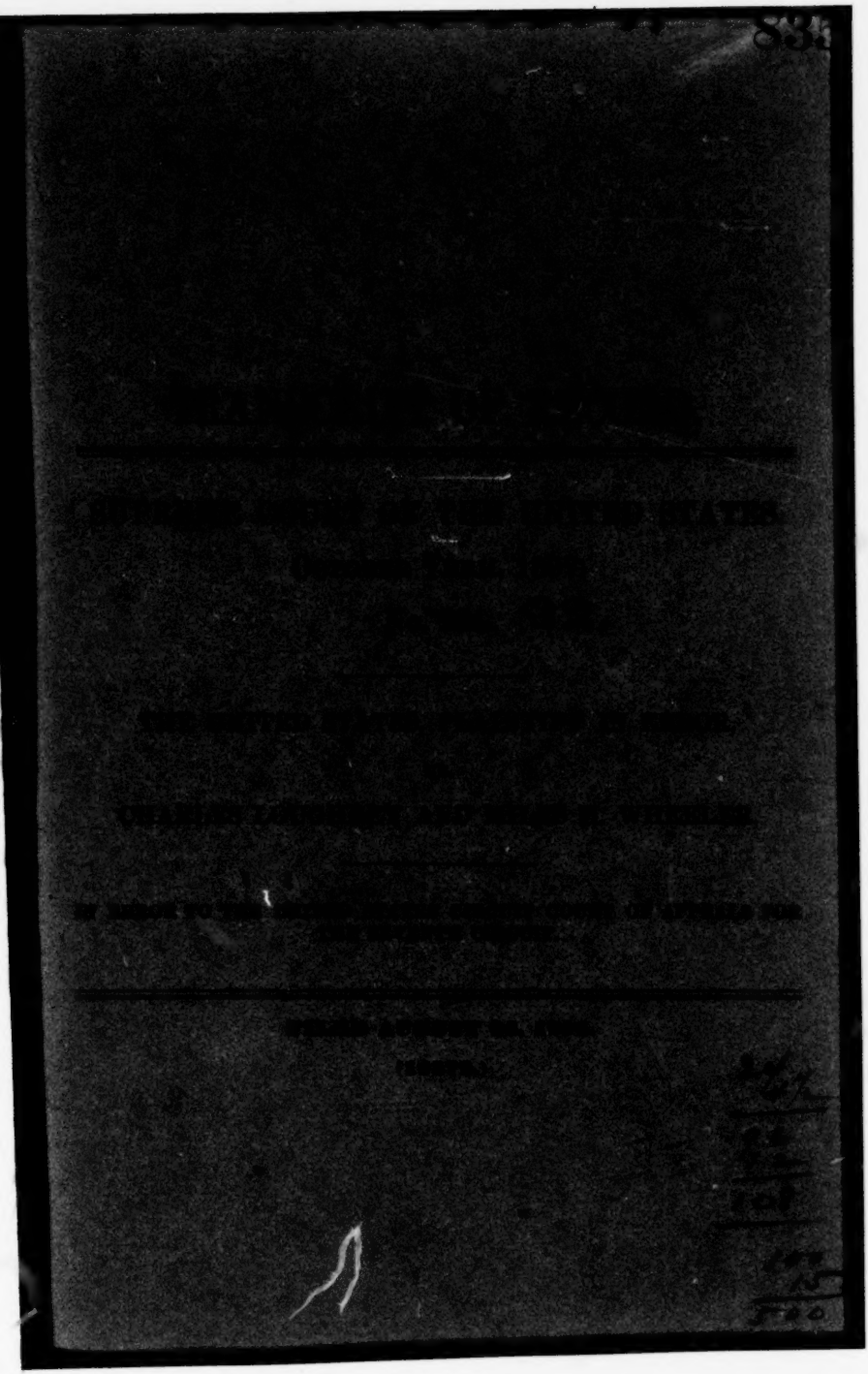


SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 224.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES LOUGHREY AND MILES H. WHEELER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

a [Transcript of record. In the United States circuit court of appeals for the seventh circuit. October term, A. D. 1893. No. 139. The United States of America vs. Charles Loughrey and Miles H. Wheeler. Mr. Thomas E. Milchrist, counsel for plaintiff in error; Mr. W. H. Webster, counsel for defendant in error. Error to the circuit court of the United States for the eastern district of Wisconsin. Transcript of record filed Oct. 6, 1893. Printed record. Department of Justice, June 22, 1896. Filed Nov. 9, 1893. Oliver T. Morton, clerk.]

b [In the circuit court of the United States for the eastern district of Wisconsin. The United States of America, plaintiff, vs. Charles Loughrey and Miles H. Wheeler, defendants. Mr. Elihu Colman, for plaintiff; Mr. W. H. Webster, for defendant.]

1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin, ss:*

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee on the first Monday (being the second day) of January, A. D. 1893. Present, the Honorable James G. Jenkins, district judge, presiding.

Præcipe for summons, filed Aug. 30, 1890.

THE UNITED STATES OF AMERICA
vs.
CHARLES LOUGHREY AND MILES H. WHEELER. } *At law.*

Be it remembered that heretofore, to wit, on the thirtieth day of August, A. D. 1890, came the U. S. district attorney, Mr. Elihu Colman, and filed his præcipe for a summons against the above-named defendants as follows:

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER,
defendants.

Issue a summons in the above-entitled case. Complaint not served.
ELIHU COLMAN,
Plaintiff's Attorney.

To EDWARD KURTZ, *Clerk.*

2 *Summons.*

Circuit court of the United States for the eastern district of Wisconsin.

[L. S.]

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER,
defendants.

The President of the United States of America to the said Defendants:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-

entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint.

The marshal of said district is hereby commanded to serve this summons, and make due return thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the eastern district of Wisconsin, this 30th day of August, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 115th.

EDWARD KURTZ, *Clerk.*

Return to summons.

ELIHU COLMAN,
U. S. District Attorney:
(P. O. address, Milwaukee, Wis.)

Served on the within-named Charles Loughrey, at Florence County, Wis., by showing him this summons and delivering to him personally a copy thereof, this first day of September, A. D. 1890.

Served on the within-named Miles H. Wheeler, at Neenah, Wis., by leaving a copy of this summons at his usual place of abode, in presence of a member of his family of suitable age and discretion, whom I informed of the contents thereof, he not being found, this 15th day of September, A. D. 1890.

G. N. WISWELL, *Marshal.*
By HENRY MARSHALL, *Deputy.*

3 September 16, 1890. This day came the district attorney and filed his complaint, as follows:

Complaint, filed Sept. 16, '90.

Circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER,
defendants.

The plaintiff herein, the United States of America, by Elihu Colman, its attorney, for complaint in this action respectfully shows to the court and alleges upon information and belief:

That at the times hereinafter mentioned the plaintiff herein was the owner of the lands described as follows, to wit: The north half (N. ½) of the northwest quarter (NW. ¼) and the northwest quarter (NW. ¼) of the northeast quarter (NW. ¼) and the southeast quarter (SE. ¼) of section thirteen (13), township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, said lands forming a part of the public domain.

That during the winter of 1887 and 1888 one Joseph E. Sauve knowingly and wrongfully entered on the above mentioned and described lands, and there cut down and caused to be cut down six hundred thousand

(600,000) feet, board measure, of pine trees, without the knowledge or consent of this plaintiff.

That thereafter said Joseph E. Sauve transported and caused to be transported to the banks of Paint River eighty thousand (80,000) feet, board measure, of said timber, which thereupon was and became worth seven and 50-100 dollars ($7.50) per thousand (1,000) feet, and that said Joseph E. Sauve skidded and caused to be skidded on the said land
4 where cut the balance of said timber, to wit, five hundred and twenty thousand (520,000) feet, board measure, which thereupon was and became worth six dollars ($6.00) per thousand (1,000) feet.

That during said winter of 1887 and 1888 said Joseph E. Sauve sold to the defendants, Charles Loughrey and Miles H. Wheeler, all of said timber, to wit: The eighty thousand (80,000) feet at Paint River, and the five hundred and twenty thousand (520,000) feet on skids on said land, and that the defendants, Charles Loughrey and Miles H. Wheeler, thereupon during the winter of 1887 and 1888, and prior to the first day of March, 1888, wrongfully took possession of all of the aforesaid timber and converted the same to their own use to plaintiff's damage, in the sum of three thousand seven hundred and twenty dollars ($3,720), with interest on said amount from March 1, 1888.

Wherefore, plaintiff demands judgment against the defendants for the sum of three thousand seven hundred and twenty dollars ($3,720), with interest thereon from the first day of March, A. D. 1888, and with the costs and disbursements of this action.

ELIHU COLMAN,
Attorney for the United States of America, plaintiff.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Elihu Colman, being duly sworn, says that he is the attorney and agent for the United States of America for the eastern district of Wisconsin. That he makes this verification for and on behalf of said plaintiff as such attorney and agent. That he has read the foregoing complaint and knows the contents thereof. That the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 6th day of September, A. D. 1890.

ELIHU COLMAN.
WM. D. CONKLIN,
United States Commissioner, E. Dist. Wisconsin.

5 December 31, 1890. This day came the defendants, by their attorney, Mr. W. H. Webster, and filed their answer, as follows:

Answer, filed Dec. 31, 1890.

Circuit Court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER,
defendants.

The defendants answer the complaint herein as follows:

They admit that they purchased of Joseph E. Sauve, named in said

complaint, about the time therein stated, a quantity of timber in the log, not to exceed four hundred thousand (400,000) feet, board measure, or two thousand dollars in value, cut about the time stated in the complaint, upon the N. ½ of NW. ¼, the NW. ¼ of NE. ¼ and SE. ¼ of NE. ¼ of section thirteen (13) in township forty-four (44) N. of range thirty-five (35) W., in the State of Michigan, but upon no other lands, and subsequently sold and disposed of the same.

Further answering said complaint, the defendants allege upon information and belief that, except as hereinbefore stated, no allegation of said complaint is true.

They therefore demand judgment for the dismissal of the complaint herein, and for the costs and disbursements of this action.

W. H. WEBSTER,
Deft's Atty.

DEC. 31st, 1890.

STATE OF WISCONSIN, *County of Oconto, ss:*

W. H. Webster, being sworn, deposes and says he is one of the attorneys for the defendants in the foregoing entitled action, and makes this affidavit for and in behalf of said defendants, both of whom reside
6 out of, and neither of whom is now within, the county of Oconto, in said State, in which county deponent resides and now is, which is the reason deponent and neither of the defendants verifies this answer; that deponent drew the foregoing answer and knows the contents thereof. That the same is true of his own knowledge, except as to these matters therein stated on information and belief, and as to those matters he believes it to be true. That the grounds of his belief consist of statements made to him by the defendants with reference to the acts, matters, and things stated in the complaint herein and in the foregoing answer.

W. H. WEBSTER.

Subscribed and sworn to before me this 31st day of Dec., 1890.

F. F. WHEELER,
Circuit Court Commissioner in and for Oconto Co., Wis.

February 25, 1893. Stipulations of the parties in writing, waiving a jury, &c., filed, as follows:

Stipulation, waiving jury and agreement as to facts, filed Feb. 25, '93.

In circuit court of the United States, for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER,
defendants.

It is stipulated by and between the parties to this action that a jury is waived and the same be tried by the court without a jury.

It is further stipulated that, the facts having been ascertained to be as hereinafter stated, the court shall try the case upon such facts, which are hereby stipulated to be as follows:

First. The defendants, prior to the first day of March, 1888, cut and removed from the north half (½) of the northwest quarter (NW. ¼), and the northwest quarter (NW. ¼) of the northeast quarter (NE. ¼),
7 and the southeast quarter (SE. ¼) of the northeast quarter (NE. ¼) of section thirteen (13), in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from said land was not a willful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

Fourth. That the value of said timber shall be fixed as follows: That the value of the same upon the land or stumpage, at $2.50 per thousand, board measure; that the value of the same when cut and upon the land, $3.00 per thousand, board measure; that the value of the same when placed in the river was $5.00 per thousand, board measure; that the value of the same when manufactured was $7.00 per thousand, board measure.

Fifth. That the lands above described were a part of the grant of lands made to the State of Michigan by an act of the Congress of the United States, approved June 3, 1856, being chapter 44 of Volume II of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature approved February 14th, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad mentioned in said act No. 126 of the laws of Michigan of 1857 to run from Ontonagon to the Wisconsin State line, therein denominated "The Ontonagon and State Line Railroad Company."

Dated October 14th, 1892.

ELIHU COLMAN,
Plaintiff's Attorney.

W. H. WEBSTER,
Defendants' Attorney.

8 *Second stipulation as to facts.*

In circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER,
DEFENDANTS.

It is further stipulated—

First. That the lands in question were never earned by any railroad or other company under the act of Congress of June 3rd, 1856, United States Statutes at Large, Volume II, page 21.

Second. That the stipulation heretofore made shall be understood to cover only the facts therein agreed upon.

Third. That the history of the Ontonogan and State Line Railroad grant, marked "Exhibit A," may be used as evidence as far as applicable to this case.

ELIHU COLMAN,
Attorney for Plaintiff.

W. H. WEBSTER,
Attorney for Defendants.

9 *Trial of case before the court.*

And now, at this same term, to wit, January term, 1893, and on the fortieth day thereof, to wit, on the 25th day of February, A. D. 1893, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
CHARLES LOUGHREY & MILES H. WHEELER. } At law.

This day came the parties by their counsel, Mr. Elihu Colman, district attorney, appearing for the plaintiff, and Mr. W. H. Webster for the defendants, and the issue herein came on to be tried before the court, pursuant to the agreement in writing of the parties, waiving a jury, herein filed. And said issue was thereupon tried by the court without a jury, and being argued by said counsel upon the pleadings and evidence, and submitted, the court took the same under consideration.

Judgment.

And afterwards, to wit, on the fifty-sixth day of said term, to wit, on the 16th day of March, A. D. 1893, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
CHARLES LOUGHREY & MILES H. WHEELER. } At law.

This cause having been heretofore submitted upon the pleadings and evidence, on consideration thereof and of the arguments of counsel thereon, the court doth find the issue herein in favor of the defendants as per findings of fact and conclusions of law herein filed.

Whereupon it is considered and adjudged by this court now here that the United States of America, plaintiff, take nothing by their writ, and that the defendants go thereof acquit without day.

Judgment roll signed March 16th, A. D. 1893.

EDWARD KURTZ, *Clerk.*

10 Which findings of fact and conclusions of law are as follows, to wit:

Findings of facts and conclusions of law.

In circuit court of United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER, defendants.

At the January term of said court, begun and held at the city of Milwaukee in said district January 2, 1893, Hon. James G. Jenkins, judge, presiding, this cause being at issue and upon the calendar for trial at said term of court, and the parties, by stipulation in writing filed herein, having waived a jury and stipulated that the case be tried by the court without a jury, and the same having been so tried, Elihu Colman, esq., United States district attorney for this district, appearing for the plaintiff, and W. H. Webster, esq., appearing for the defendants, the court now finds the facts to be as follows:

First. The defendants, prior to the 1st day of March, 1888, cut and removed from the north half (½) of the northwest quarter (¼) and the northwest quarter (¼) of the northeast quarter (¼) and the southeast quarter (¼) of the northeast quarter (¼) of section thirteen (13) in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber, and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from the said land was not a wilful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

11 Fourth. That the value of said timber standing was $2.50 per thousand feet, board measure, and the value of the same in the log upon the land where cut was $3.00 per thousand feet, board measure, and in the log in the river $5.00 per thousand feet, board measure, and manufactured into lumber $7.00 per thousand feet, board measure.

Fifth. That the lands above described were, at the time of such cutting, removal, and conversion of said timber, a part of the grant of land made to the State of Michigan by an act of the Congress of the United States, approved June 3rd, 1856, being chapter 44 of Volume II of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature, approved February 14th, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad mentioned in said act, No. 126, of the laws of Michigan of 1857, to run from Ontonagon to the Wisconsin State line, and there denominated "The Ontonagon and State Line Railroad Company."

Sixth. That said railroad was never built, and said grant of lands was never earned by the construction of any railroad.

As conclusions of law the court finds:

First. That the cause of action sued on in this case did not, at the time of the commencement of this action, and does not now, belong to the United States of America.

Second. That the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

Let judgment be entered accordingly.

By the court:

JAS. G. JENKINS, *Judge.*

12 June 10, 1893. This day came the district attorney, Mr. J. H. M. Wigman, and filed his exceptions to said findings, as follows:

Exceptions to findings, filed June 10, 1893.

Circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER,
defendants.

And now comes the plaintiff, by its attorney, and excepts to the finding of facts herein by the court and its conclusions of law thereon, as follows:

The plaintiff excepts to the conclusion of law herein by the court by which it finds that the cause of action sued in this case did not at the time of the commencement of this action, and does not now, belong to the United States of America.

The plaintiff excepts to the conclusion of law found by the court by which it finds that the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

The plaintiff excepts to the order of the court herein made ordering that judgment be entered accordingly.

The plaintiff excepts to the failure of the court to find as facts herein that the "Ontonagon & State Line Railroad Company" had neglected and failed to complete its road within the time limited by law, that the lands described in the complaint remained unsold, and that the said lands reverted to the United States long before the commencement of this action.

13 The plaintiff excepts to the failure of the court to find that at the time of the cutting and removing of the timber by the defendant the lands on which said timber was cut, and described in the complaint, was and formed a part of the public domain.

The said plaintiff excepts to the failure of the court to find that at the time of the cutting and removing of said timber the United States was the owner of the said lands and timber. The plaintiff excepts to the failure of the court to find, as conclusion of law, that the plaintiff was entitled to judgment against the said defendants for the value of the timber cut and removed by the defendants from the lands described in the complaint, and converted by them to their own use.

The plaintiff excepts to the failure of the court to order judgment in favor of the plaintiff, and against the said defendants, for the value of the said timber cut and removed by said defendants from said lands and so converted by them to their own use.

The plaintiff excepts to the judgment herein by the court by which it adjudged that the plaintiff take nothing by their writ and that the defendants go thereof acquit without day.

J. H. M. WIGMAN,
U. S. Attorney for the East. Dist. of Wisc.

Allowance of writ of error.

September 6, 1893. This day came the distri[illegible] attorney, Mr. J. H. M. Wigman, and filed his assignment of errors, and upon his application it is ordered by the circuit judge that a writ of error be allowed, and that a transcript of record, with said writ of error, be forwarded to the United States circuit court of appeals for this circuit, at Chicago, Ill. Whereupon a writ of error and citation issued, returnable on the 6th day of October next, and a copy of said writ of error lodged for the defendants in error.

14 Which assignment of errors and prayer for a writ of error are as follows:

Assignment of errors.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER, defendants in error.

Afterwards, to wit, on the 6th day of September, in the year of our Lord one thousand eight hundred and ninety-three, comes the United States of America by J. H. M. Wigman, U. S. attorney for the eastern district of Wisconsin, its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit, that the court of the United States for the eastern district of Wisconsin erred in finding as conclusion of law:

1st. That the cause of action sued in this case did not at the time of the commencement of this action, and does not now, belong to the United States of America.

2nd. That the said circuit court of the United States for the eastern district of Wisconsin erred in finding as conclusion of law that the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

3rd. That the said circuit court of the United States for the eastern district of Wisconsin erred in ordering that judgment be entered accordingly.

4th. That the said circuit court of the United States for the eastern district of Wisconsin erred in failing to find as a fact herein
15 that the Ontonagon & State Line Railroad Company had neglected and failed to complete its road within the time limited by law, and that the lands described in the complaint remained unsold, and that the said lands reverted to the United States long before the commencement of this action.

5th. That the said circuit court of the United States for the eastern district of Wisconsin erred in failing to find as a fact herein, that, at the time of the cutting and removing of the said timber by the defendants, the lands on which said timber was cut and described in the complaint was and formed a part of the public domain.

6th. The said circuit court of the United States for the eastern district of Wisconsin erred in failing to find that, at the time of the cutting and removing of the said timber, the plaintiff was the owner of the said lands and timber.

7th. The said circuit court of the United States for the eastern district of Wisconsin erred in failing to find as conclusions of law that the United States of America was entitled to judgment against the said defendants for the value of the timber cut and removed by said defendants from the lands described in the complaint and converted to their own use.

8th. That the said circuit court of the United States for the eastern district of Wisconsin erred in not ordering and decreeing judgment in favor of the said plaintiff and against the said defendants for the value of the said timber cut and removed by said defendants from said lands and so converted by them to their own use with costs.

Wherefore the United States of America prays that the judgment of the circuit court of the United States for the eastern district of Wisconsin be reversed, and the said circuit court of the United States for the eastern district of Wisconsin be ordered to enter an order directing judgment in favor of the United States of America and against the defendants, Charles Loughrey and Miles H. Wheeler, for the value of the timber cut and removed by them from the lands in the complaint described and by them converted to their own use with the costs of this action.

J. H. M. WIGMAN,
U. S. Attorney for the East. District of Wisconsin,
Green Bay, Wisconsin.

16 *Petition for writ of error, filed Sept. 6, '93.*

United States of America, eastern district of Wisconsin.

To the Circuit Court of the United States for the Eastern District of Wisconsin:

And now comes the United States of America, by J. H. M. Wigman, its attorney, and complains that in the records and proceedings, and also in the rendition of judgment in a suit between The United States of America, plaintiff, and Charles Loughrey and Miles H. Wheeler, defendants, tried in the circuit court of the United States for said eastern district of Wisconsin, at the January term thereof, A. D. 1893, and in which judgment was rendered against said plaintiff by the dismissal of the complaint upon

its merits on the 16th day of March, A. D. 1893, manifest error hath intervened, to the great damage of the said plaintiff.

Wherefore said plaintiff prays for the allowance of a writ of error and such other process, and that a transcript of the records and proceedings, evidence, and papers in said action, duly authenticated, may be sent to the United States circuit court of appeals for the seventh circuit, as may cause the same to be corrected by said United States circuit court of appeals for the seventh circuit.

J. H. M. WIGMAN,
U. S. Attorney for Eastern District of Wisconsin.

And now, to wit, on the 6th day of September, 1893, it is ordered that the writ of error be allowed as prayed for.

JAS. G. JENKINS,
Circuit Judge.

17 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writing annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom; and that the same is a true copy of the record, exceptions, assignment of errors, and all proceedings in the case of The United States vs. Charles Loughrey et al.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 118th.

EDWARD KURTZ, *Clerk.*

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The United States of America, plaintiff, and Charles Loughrey and Miles H. Wheeler, defendants, a manifest error hath happened, to the great damage of the said United States of America as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that

then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the
18 United States circuit court of appeals for the seventh circuit, together with this writ, so that you have the same at Chicago, Illinois, on the 6th day of October next, in the said circuit court of appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this sixth day of September, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 118th.

EDWARD KURTZ, *Clerk.*

Citation.

UNITED STATES OF AMERICA, *ss:*

To CHARLES LOUGHREY and MILES H. WHEELER, greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the seventh circuit, to be holden at Chicago, Illinois, on the 6th day of October, A. D. 1893, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable James G. Jenkins, circuit judge of the United States for the seventh judicial circuit, at the city of Milwaukee, this 6th day of September, A. D. 1893, and of the Independence of the United States the 118th.

JAS. G. JENKINS,
U. S. Circuit Judge.

I accept service of above citation this 3d day of October, A. D. 1893.

W. H. WEBSTER,
Attorney for Defendants in Error.

18½ MAY 31, 1894.

Court met pursuant to adjournment.

Present: Hon. John M. Harlan, circuit justice; Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge.

UNITED STATES OF AMERICA
v. } 139.
CHARLES LOUGHREY AND MILES H. WHEELER.

It is ordered by the court that this cause be and the same is hereby passed.

Order.

It is ordered by the court that Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, is designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

19 MONDAY, *June 4, 1894.*

Court met pursuant to adjournment.

Present: Hon. John M. Harlan, circuit justice; Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

Before Hon. John M. Harlan, circuit justice; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

UNITED STATES OF AMERICA
v. } 139.
CHARLES LOUGHREY AND MILES H. WHEELER.

It is ordered by the court by the court that the plaintiff in error be and is hereby allowed until Friday next in which to file brief in above-entitled cause.

20 MONDAY, *October 1, 1894.*

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court rooms, in the city of Chicago, in said seventh circuit, on Monday, the first day of October, 1894, of the said October term, in the year of our Lord one thousand eight hundred and ninety-four and of our Independence one hundred and nineteenth year.

Present: Hon. John M. Harlan, circuit justice; Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge.

UNITED STATES OF AMERICA,
v. } 139.
CHARLES LOUGHREY AND MILES H. WHEELER.

It is ordered by the court that this cause be and the same is hereby continued.

21 MONDAY, *January 7, 1894.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge.

It is ordered by the court that John H. Baker, judge of the district court of the United States for the district of Indiana, is designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Baker appeared and took his seat as a member of said court.

UNITED STATES OF AMERICA,
v.
CHARLES LOUGHREY AND MILES H. WHEELER, } 139.

It is ordered by the court that this cause be and the same is hereby set down for hearing January 22, 1895.

22 TUESDAY, *January 8, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that Mr. J. H. M. Wigman may be and is hereby substituted for Mr. Thomas E. Milchrist as counsel for the United States of America, plaintiff in error, in above-entitled cause.

THURSDAY, *January 24, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

23 UNITED STATES OF AMERICA
v.
CHARLES LAUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby continued.

MONDAY, *May 6, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby passed.

24 MONDAY, *October 7, 1895.*

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court rooms, in the city of Chicago, in said seventh circuit on Monday, the seventh day of October, 1895, of the said October term, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence one hundred and twentieth year.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby passed.

25 TUESDAY, *October 8, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

Order.

It is ordered by the court that Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, is designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

WEDNESDAY, *October 16, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

26 UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby set down for hearing November 5, 1895.

TUESDAY, *November 5, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

Now this day came the parties by their counsel and this cause
27 comes on to be heard on the printed record and briefs of counsel, and the court now being sufficiently advised, takes this matter under consideration.

28 United States circuit court of appeals for the seventh circuit.
No. 139. October term, 1894.

THE UNITED STATES OF AMERICA, plaintiff in error, *vs.* CHARLES LOUGHREY AND MILES H. Wheeler. } Error to the circuit court for the eastern district of Wisconsin.

Before WOODS and SHOWALTER, circuit judges, and BUNN, district judge.

The plaintiff in error sued the defendants in error in trover for timber cut from the north half of the northwest quarter of the northeast quarter of section thirteen, township forty-four north, of range thirty-five west, in the State of Michigan. The complaint charges the cutting of the timber by one Joseph E. Sauve, and that he removed from the lands 80,000 feet of timber so cut and left the balance skidded upon the lands. The defendants are charged as purchasers from Sauve. The amount of timber cut by Sauve is alleged to have been 600,000 feet, and the time of the cutting in the winter of 1887–8 and prior to the first day of March, 1888.

The case was tried by the court without a jury upon facts stipulated as follows:

First. The defendants, prior to the first day of March, 1888, cut and removed from the north half (½) of the northwest quarter (NW. ¼), 29 and the northwest quarter (NW. ¼) of the northeast quarter (NE. ¼), and the southeast quarter (SE. ¼) of the northeast quarter (NE. ¼) of section thirteen (13), in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber, and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from said land was not a willful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

Fourth. That the value of said timber shall be fixed as follows: That the value of the same upon the land or stumpage, at $2.50 per thousand, board measure; that the value of the same when cut and upon the land, $3.00 per thousand, board measure; that the value of the same when placed in the river was $5.00 per thousand, board measure; that the value of the same when manufactured was $7.00 per thousand, board measure.

Fifth. That the lands above described were a part of the grant of lands made to the State of Michigan by an act of the Congress of the United States, approved June 3, 1856, being chapter 44 of Volume II, of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature, approved February 14th, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad mentioned in said act No. 126 of the laws of Michigan of 1857, to run from Ontonagon to the Wisconsin State line, therein denominated "The Ontonagon and State Line Railroad Company."

Dated October 14th, 1892.

The finding of facts by the court was in accordance with the foregoing stipulation, with the additional finding that said railroad was never built and said grant of lands was never earned by the construction of any railroad.

And as conclusions of law, the court found:

First. That the cause of action sued on in this case did not, at the time of the commencement of this action, and does not now, belong to the United States of America.

Second. That the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

No exceptions were taken to the court's findings of fact, and no requests to find were made. Exceptions were only taken to the conclusions of law found by the court and to its failure to find other and contrary conclusions.

30 BUNN, district judge, after stating the case as above, delivered the opinion of the court:

We think the conclusions of law found by the court are fully supported by the adjudged cases. The act of Congress of June 3, 1856, constituted a conveyance in præsenti of the lands in question to the State of Michigan. By that act the State of Michigan took the title to the lands, subject, of course, to be defeated by nonperformance of the conditions upon which the grant of lands was made. Until there occurred a breach of these conditions subsequent, the title would remain in the State of Michigan, and a trespass upon the lands would be one for which an action would lie by the State. And even though the conditions upon which the grant was made might never have been complied with, the title would not revert to the Government until some action should be taken by the Government or by Congress declaring the forfeiture and taking back the lands. No such action was taken by Congress in this case until after the acts complained of were committed, and even then it does not appear that the act of Congress included the lands in question. No one had a right to complain of the nonaction by the Government in failing to declare a forfeiture and reinvest itself with the title to the lands, and until it did so the title remained in the State. As the record shows title out of the Government by an act conveying title in præsenti from and after June 3, 1856, it was incumbent upon the plaintiff in error to show that it had declared a forfeiture and reinvested itself with the title before the time of the cutting of the timber in the winter of 1888. This it has not done. The only attempt to show a reinvestment of title in the Government is by the act of March 2, 1889, 25 St. at Large, 1008, passed a year after the trespass was committed by Sauve, and that act does not appear by its terms to cover the land in question. That act declared a forfeiture of lands coterminous with the uncompleted portion of the railroad, in aid of which the grant of 1856 was made, and there is nothing in the record to show whether it covered these lands or not. So that there is no evidence that the Government has ever resumed title to the lands from which the timber was cut. But even if the act were broad enough to cover the lands in question, it would still appear that when the cutting and removal of the timber was done, the title was in the State of Michigan and might always remain there. Moreover, there was no attempt on the part of Congress to take back more than the title to the lands, or in any way to invest itself with the right to sue for trespasses committed while the title was out of the Government.

A construction was placed upon the act of June 3, 1856, by
31 the Supreme Court in Lake Superior Ship Canal Company v. Cunningham (155 U. S., 345), following the cases of Schulenberg v. Harriman (21 Wall., 44); United States v. Southern Pacific Railroad (146 U. S., 570), and United States v. Northern Pacific Railroad (152 U. S., 284).

In the opening of the opinion by Mr. Justice Brewer, on p. 371, the court says:

"The act of June 3, 1856, was a grant in praesenti, and when by the filing of the map of definite location the particular tracts were identified, the title to those lands was vested in the State of Michigan, to be disposed of by it in aid of the construction of a railroad between Ontonagon and the Wisconsin State line. The lands were withdrawn from the public domain and no longer open to settlement by individuals for preemption or other purposes. Although there was a provision for the forfeiture of the lands if the roads was not completed within ten years, such provision was a condition subsequent, which could be enforced only by the original grantor, the United States. And until in some appropriate method it asserted its right of forfeiture the title remained in the State of Michigan or the corporations upon which from time to time it conferred the benefit of the grant."

In Schulenberg v. Harriman (21 Wall., 44) a similar act passed on the same day granting lands to the State of Wisconsin for similar purposes was under consideration and the same ruling was made. That case, like this, involved a contest over pine logs cut upon the land while held by the State, and it was held that the right of action was in the State or those holding under it. In the opinion of this court the case at bar is properly ruled by that case. In that case it was held to be settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, * * * and if they do not see fit to assert the right to enforce forfeiture on that ground the title remains unimpaired in the grantee; and that the title to the land remaining in the State, the lumber cut upon the land belonged to the State. That whilst the timber was standing, it constituted part of the realty; being severed from the soil, its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land and could be pursued wherever it was carried.

The only doubt that could exist in regard to the case being ruled by Schulenberg v. Harriman is that in that case, although the conditions of the grant had been broken by a total failure to build the road, still no forfeiture had been declared by Congress. But as we have seen, the act declaring a forfeiture in the case at bar was passed a year after
32 the cutting of the timber, and besides that, the act does not profess to apply to all lands granted by the act of June, 1856, to the State of Michigan, but only to such portions of the land granted as were opposite to and coterminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted. The forfeiture was not declared until a year after the timber in question was severed from the land and, according to the doctrine of the Supreme Court of the United States, became personal property belonging to the State.

We think, therefore, that the court below was right in holding that the cause of action did not belong to the plaintiff at the time of the commencement of the action, or at the time of the trial.

The judgment of the circuit court is affirmed.

Filed Feb. 8, 1896.

OLIVER T. MORTON, *Clerk.*

33 SATURDAY, *February 8, 1896.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

UNITED STATES OF AMERICA,
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

In error to the circuit court of the United States for the eastern district of Wisconsin.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Wisconsin and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

34 TUESDAY, *June 2, 1896.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

Before: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA,
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by this court that mandate in this cause be, and the same is hereby, withheld until further order of this court.

35 United States circuit court of appeals for the seventh circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 34, inclusive, contain a true copy of the transcript of record and proceedings in the United States circuit court of appeals for the seventh circuit, in the case of United States of America vs. Charles Loughrey and Miles H. Wheeler, No. 139, October term, 1894, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 6th day of June, A. D. 1896.

[SEAL.] OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

36 UNITED STATES OF AMERICA, *ss:*

To CHARLES LOUGHREY and MILES H. WHEELER, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the seventh circuit, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 28th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

37 On this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared Albert J. Cummings before me, the subscriber, a duly qualified and acting cir. ct. commissioner in and for Oconto County, Wisconsin, and makes oath that he delivered a true copy of the within citation to W. H. Webster, the attorney for the defendants, Charles Loughrey and Miles H. Wheeler, on August 19th, 1896, in the city of Oconto, Wis.

ALBERT J. CUMMINGS.

Sworn to and subscribed the 19th day of August, A. D. 1896.

FRANCIS X. MORROW,
Circuit Court Commissioner in and for Oconto Co., Wis.

(Indorsed:) Due service of the within citation on me admitted this 19' day of August, 1896.

38 Afterwards, to wit, on the first day of August, in the term and year last aforesaid, the following further proceedings were had in said cause and entered of record, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER.

Petition for writ of error.

To the Honorable JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States:

Come now the petitioners, the United States, by the Solicitor-General, and complaining that they are aggrieved by the judgment of the United States circuit court of appeals for the seventh circuit, rendered in the above-entitled cause, respectfully pray for the allowance of a writ of

error that the same may be reviewed by the Supreme Court of the United States.

(Signed) HOLMES CONRAD,
Solicitor-General.

39 Allowed July 28th, 1896.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

40 And on the same day, to wit, the first day of August, in the term and year last aforesaid, came the United States of America, by the Solicitor-General, and filed in the office of the clerk of said court its assignment of errors in the words and figures following, to wit:

In the Supreme Court of the United States, October term, 1896.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
CHARLES LOUGHREY AND MILES H. WHEELER, defendants in error.

Assignment of errors.

Comes now the Solicitor-General, on behalf of the plaintiff in error, and says that in the record and proceedings in the above-entitled cause in the United States circuit court of appeals for the seventh circuit there is manifest error in this, to wit:

The court erred in its decision by affirming the judgment of
41 the circuit court of the United States in and for the eastern district of Wisconsin.

2d. The court erred in its decision by holding and deciding "that the court below was right in holding that the cause of action did not belong to the plaintiff at the time of the commencement of this action or at the time of the trial."

3d. The court erred in failing to decide that the Ontonagon and State Line Railroad Company had neglected and failed to complete its road within the time limited by law and that the lands described in the complaint remaining unsold reverted to the United States before the commencement of this action.

4th. The court erred in failing to decide that at the time of the cutting and removing of the timber by the defendants the land on which the timber was cut was and formed a part of the public domain.

5th. The court erred in failing to decide that at the time of the cutting and removing of said timber, as well as at the time of the commencement of this action, the plaintiff was the owner of the lands and timber.

42 6th. The court erred in failing to decide that the lands were granted on condition subsequent which was not fulfilled and that the lands had reverted to the United States.

7th. The court erred in failing to decide that title and right of possession to the lands was in the United States.

8th. The court erred in failing to decide that at the time of the commencement of this action, as well as at the time of the trial, the cause of action was in the United States and that it could maintain this action against the defendants to recover the value of the timber which said defendants had wrongfully taken from the lands.

9th. The court erred in failing to order and decree the reversal of the judgment of the circuit court of the United States in and for the eastern district of Wisconsin and to order said court to enter judgment in favor of the United States of America and against said defendants Charles Loughrey and Miles H. Wheeler for the value of said timber, with costs.

(Signed) HOLMES CONRAD,
Solicitor-General.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the United States circuit court of appeals for the seventh circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between the United States of America, plaintiff in error, and Charles Loughrey and Miles H. Wheeler, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

44 A transcript of the record and proceedings of the suit whereof mention is within made, with all things concerning the same, I herewith certify to the justices of the said Supreme Court of the United States within the day and at place within mentioned, as within I am commanded.

OLIVER T. MORTON, [SEAL.]
Clerk of United States Circuit Court of Appeals
for the Seventh Circuit.

45 United States circuit court of appeals for the seventh circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 41, inclusive, contain a true copy of the transcript of record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of United States of America vs. Charles Loughrey and Miles H. Wheeler, No. 139, October term, 1894, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 13th day of August, A. D. 1896.

[SEAL.] OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Indorsed on cover:) Case No. 16372. Term No. 224. The United States, plaintiff in error, vs. Charles Loughrey and Miles H. Wheeler. U. S. circuit court of appeals, 7th circuit. Filed August 25, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PLAINTIFFS IN ERROR,
v.
CHARLES LOUGHREY AND MILES H. WHEELER, DEFENDANTS IN ERROR.

No. 224.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

This is a writ of error sued out by the United States from a judgment rendered against it in an action of trover brought upon an agreed statement of facts (Rec., pp. 5–16) for the recovery of the value of certain timber cut by the defendants in error from certain lands in the State of Michigan, alleged to be the property of the United States. Briefly, those facts are as follows:

It is conceded that the defendants in error, prior to the 1st of March, 1888, cut and removed from the north

half of the northwest quarter, and the northwest quarter of the northeast quarter and the southeast quarter of the northeast quarter of section 13, in township 44, range 35 west, in the State of Michigan, 400,000 feet of pine timber, and converted the same to their own use. It is not pretended that the defendants in error had or claimed any right, title, interest, possession or right of possession in the lumber so cut, and although it is stipulated in the second division of the stipulation that "such cutting and taking of said timber by the defendants from the said land was not a willful trespass," this, we take it, is a mere stipulation going to motive, for the purpose of avoiding punitive damages, and is not in anywise to be regarded as a claim of right.

It is further stipulated that none of the lands in question were ever owned or held by any party as a homestead, and that the value of the timber was $7 per 1,000 feet, board measure. It is agreed that the lands above described were a part of the grant of land made to the State of Michigan by an act of Congress of the United States approved on the 3d of June, 1856 (11 Stat. L., ch. 44, p. 21), and that the said lands were accepted by the State of Michigan by an act of its legislature approved February 14, 1857 (Public act No. 126, Laws of Michigan for year 1857), and were a part of the lands of said grant within the 6-mile limit, outside of the common limits, certified and approved to the State by the Secretary of the Interior to aid in the construction of the railroad mentioned in said act No. 126 of the Laws of Michigan for the year 1857, to run from Ontonagon to

the Wisconsin State line, and denominated the Ontonagon and State Line Railroad Company. It is further conceded that said railroad was never built, and that the lands above described were never earned by the construction of that or any other railroad.

Although it is not contained in the agreed statement of facts, yet the fact is, as appears from the public laws and from the decisions of this court, that on March 2, 1889, the United States, by act of Congress (25 Stat., 1008), forfeited this Ontonagon grant and restored the land so granted to the public domain. The action in this case was begun on August 16, 1890 (Rec., p. 2, folio 3). And it is also a fact that on the 21st of February, 1867 (1 Laws Michigan, 1867, p. 317), the legislature of Michigan passed a joint resolution for the restoration of this land to the United States, and authorizing the governor of that State to release said lands to the United States, and subsequently, by a formal release, the governor of the State of Michigan reconveyed said lands to the United States on August 14, 1870, which was held by this court to be beyond the scope of his power, the court being of opinion that this act of the Michigan legislature referred to the Marquette and not to the Ontonagon road. (See *Lake Superior Ship and Canal Railway and Iron Company* v. *Cunningham*, 155 U. S., 354.)

Under this condition of facts, the court below rendered judgment in favor of the defendants in error, holding as a matter of law that inasmuch as this grant by the United States to the State of Michigan for the purpose aforesaid was a grant *in præsenti*, that title to said land remained

in the grantee unless, except, and until said title was formally retaken by the United States by Congressional act of forfeiture or appropriate judicial proceedings for that purpose, and that inasmuch as title to the said land was not in the plaintiffs in error at the time of the cutting of the timber, that therefore the action of trover could not be maintained. To review this decision a writ of error has been sued out from this court.

ASSIGNMENT OF ERRORS.

The court erred:

First. In holding that the title to the timber cut from the land, or the title to the land itself, was not in the United States at the time of said conversion.

Second. In rendering judgment in favor of the defendants in error and against the plaintiffs in error.

Third. In failing to hold that at the time of the conversion of said timber, the title ownership, and right of possession was in the plaintiffs in error.

ARGUMENT.

I.

Where title to the land upon which the lumber was cut is in the United States, the severing of timber from the realty does not change the title. The character of the lumber by the act of felling is changed from realty to personalty, but its title is not affected. It continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of

the wrongful removal or conversion of personal property. This is the rule laid down by Mr. Justice Field in the case of *Hallock* v. *Mixer* (16 Cal., 574), when he was chief justice of the supreme court of that State, and was subsequently reannounced by that learned jurist in the case of *Schulenberg* v. *Harriman* (21 Wall., 44, 64), and this rule has been since adhered to by this court. (*Northern Pacific Railway Company* v. *Lewis*, 162 U. S., 366, 374; *United States* v. *Steenerson*, 4 U. S. App., 332, 345.)

This being true, we come to inquire in whom was title to the land from which this timber was cut at the time of the institution of this action. It is true that by the act of June 3, 1856 (11 Stat., p. 21), the United States granted this land *in presenti* to the State of Michigan to aid in the construction of a railroad, but it is also true that by the act of March 2, 1889, the grant of the land in question was revoked and the title thereto revested in the United States, and the said land was thereby restored to the public domain (25 Stat., p. 1008). The action in the case at bar was not brought until September 16, 1890. Upon this phase of the question the learned court below ruled against the contention of the Government because the act of forfeiture was not passed until a year after the cutting of the timber, without adverting in anywise to the fact that the action for the timber was brought more than a year subsequent to the act of forfeiture; and the learned court below was also doubtful whether this act of forfeiture above recited embraced the lands in question, inasmuch as that act did not purport to apply to all the lands granted by the act of June, 1856, to the State of Michigan, but to only such portions of the land granted

as were opposite to and coterminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted. (See court's opinion, Rec., p. 18, folio 32.)

Upon the latter doubt, as expressed by the learned court below, it seems to us there can be no question. It is true that this act of forfeiture did not describe the land in question by metes and bounds, but the act does in terms apply to all lands opposite to or coterminous with the uncompleted portion of any railroad. It is notorious that the railroad in aid of which this land was granted to the State of Michigan was never built, and it is stipulated in the agreed findings of fact that the land here drawn in question was never earned by any railroad. (See *R. R.* v. *Cunningham*, 155 U. S., at 367.) Manifestly, therefore, this land is embraced both in the spirit and in the letter of the act of forfeiture of March 2, 1889, and by that act title thereto was revested in the United States. The learned court below, however, though apparently conceding this point, was of opinion that such title was not sufficient to maintain trover, inasmuch as title to the land was not vested in the United States at the time of the conversion of the timber by the defendants in error, who were mere trespassers, and who did not make any claim of right, title, or interest in or to the property, and permitted such bare trespassers to defeat the action of trover by setting up a mere naked title in the State of Michigan, without in any wise connecting themselves with the State of Michigan as claimants or beneficiaries under any right or authority derived from that State. This, we submit, was error.

First. The Congressional revocation of this grant was made on March 2, 1889. This action was begun on September 16, 1890. At the time of suit, therefore, the Government had the strict legal title to this land, and we submit that by relation the title was good at the time of the felling of this timber and its conversion by a mere stranger, a trespasser upon the land, who did not even claim any right, title, or interest in the property.

The case which most nearly approaches the one at bar in its facts is that of *Musser* v. *McRae* (44 Minn., 343, 347). In that case there was an act of Congress granting lands to the State of Wisconsin in aid of a railroad which provided that it should be lawful for agents appointed by the railroad company entitled to the grant to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States "deficiency" lands, and it was held that the issuance of a patent by the United States directly to the railroad company for lands so selected by an agent of the company was evidence that the company had complied with all the conditions of the grant and was entitled to the lands described therein, and that the title passed from the United States at the date of such selection. It also appeared that after these deficiency lands had been earned in this wise by the railroad company and had been so selected and duly certified to the General Land Office, but prior to the issuance of the patent, timber had been wrongfully cut and removed therefrom by trespassers; and it was held that the title acquired by the patent must be held to relate back to the selection of the lands, so as to save to purchasers to whom the

lands had been granted by the company before the trespass a right of action for the timber wrongfully removed from the land, or its value. The court in that case said:

> The doctrine of relation is founded in equitable principles, and the party claiming its application must show an equity in his favor. It is a fiction of law resorted to for the advancement of right and justice—*ut res magis valeat quam pereat*—though it is not allowable when it would defeat the rights of third persons. But as it is admitted that the defendants were naked trespassers, they have no such rights to interpose here. Nor will the doctrine be so applied as to relieve a trespasser from all responsibility for his wrongful act. But the principle is contended for here to preserve to the plaintiffs the right of action to recover the timber or its value wrongfully taken by the defendants, and there seems to be no reason why it may not be so applied for the advancement of justice and to give the full effect to the grant it was intended to have. In *Landes* v. *Brandt* (10 How., 348, 372), the court cited with approval the language of Cruise on Real Property (vol. 5, p. 510): "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." * * * In *Landes* v. *Brandt*, *supra*, where a party had filed his claim and taken the initiatory steps to obtain title under a Spanish grant, and this right and title was sold on execution before the decision of the commissioners who were to pass on the validity of that claim, but which was subsequently confirmed by them and a patent long afterwards issued, it was held that the confirmation in

> 1811 and the patent issued in 1845 must be held to relate to the first act—that of filing the claim in 1805—so as to protect the rights of the execution creditor. So in *Heath* v. *Ross* (12 John, 140), which was an action of trover for timber cut between the application for and date of a patent from the State and its enscaling and delivery by the secretary of state, the title was held to relate back to the first act, so as to entitle the plaintiff to maintain an action against a mere wrongdoer for the value of the timber cut and carried away in the meantime.

The case of Heath *v.* Ross (12 Johns., N. Y., 140), is entirely similar in principle to the case at bar. It was an action of trover for timber cut between the application for and date of a patent from the State. In holding that the plaintiff's title related back to the date of application, the court said:

> But the application of this fiction to the case before us will produce no such result, for the defendant and the person from whom he purchased *knew that neither of them had any title to the lot or right to cut the timber. They both supposed it belonged to the State;* and the plaintiffs having obtained this title by grant, which, as between them and the State would relate back to a time before which any of the timber was cut, *must draw after it a right to the timber also. The State can have no claim upon the defendant for this timber, and the injury is without redress, unless the plaintiff's claim can be supported.* The doctrine of relation, as understood and recognized both in our own and in the English courts, is applicable to this case and makes the plaintiff's title relates back to the date of application.

As enforcing the same principle, see *Grisar* v. *McDowell* (6 Wall., 363, 380); *French* v. *Spencer* (21 How., 228–240).

The doctrine of relation has been frequently enforced by this court in land cases, notably in cases of grants *in præsenti* to aid in the construction of railroads. Such grants, until the filing of the map of definite location, are mere floats and do not attach to any specific acre of land; but, upon the filing of the map of definite location, the grants relate back and take effect as of the date of the passage of the act making the grant, though many years have intervened; and if patent is issued the title dates, not from the date of the patent, but from the date of the grant; and no valid adverse right or title can be acquired by subsequent entry or purchase. *Van Wyck* v. *Knevals* (106 U. S., 360); *R. R.* v. *Phelps* (137 U. S., 528–541); *St. Paul, &c., R. R.* v. *Northern Pacific R. R.* (139 U. S., 1, 5); *U. S.* v. *Southern Pacific R. R.* (146 U. S., 570, 593).

It is submitted, therefore, that on March 2, 1889, when Congress passed this act of forfeiture and restored the land in question to the public domain, it was the resumption of title as though the same had never been out of the United States, in so far as strangers and wrongdoers are concerned, who did not set up any rights under the State of Michigan or of the railroad company, nor make any claim whatever to the property converted. Certainly as against such persons the United States had both the title to and the right of possession of property which was by them wrongfully converted at the time of such

conversion, and they can not be permitted, by the mere technicality of asserting a bare naked title in the State of Michigan, to wrongfully enrich themselves at the Government's expense.

It is contended by counsel for the defendants in error that the act of March 2, 1889 (26 Stats., 1008), does not necessarily forfeit all of these lands to the United States, because of certain exceptions embraced in the second and third sections of that act, and that hence it does not sufficiently appear that the defendants in error are not embraced in the saving provisions of those exceptions. And they contend that it was incumbent upon the plaintiffs in error to negative these exceptions both in its pleadings and proof, and they cite in support of such a contention the case of *McGlone* v. *Prosser*, 21 Wis., 273; 1 Chitty's Pleading, 275; *Varnum* v. *Orand*, 6 B. and C., 430; and *Smith* v. *Moore*, 6 Greenleaf, 227. None of these cases are authorities for the contentions made by the defendants in error, but on the contrary are authorities directly against such contention. It is never necessary to plead the whole of a statute or instrument unless the action is founded solely upon an instrument or a statute, and then only when the exception is contained in the general clause. The doctrine does not in anywise apply to the pleading of a statute where the exceptions are in separate clauses. The court will observe that the exceptions to the act of March 2, 1889, are not embraced in the general enacting clause of the act, but are contained in separate and distinct sections. As was said by Lord

Chief Justice Tenterden in the case of *Varasour* v. *Ormrod* (6 B. and C., 430, 432):

> If an act of Parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause only in pleading may set out that clause without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception, and if he state it as including an absolute, unconditional stipulation, without noticing the exception, it will be a variance.

To the same effect is the case of *McGlone* v. *Prosser* (21 Wis., 273), cited by the defendants in error. In that case there was a statute which provided that a certificate of sale of school lands issued by the commissioners shall be sufficient evidence of title to enable the purchaser to maintain an action to recover possession of such lands, etc., "unless such certificate shall have become void by forfeiture." It was held in an action of ejectment by the holder of such certificate that an averment that he is the owner thereof and entitled to the possession of the premises is not sufficient without a further averment that the certificate had not become void by forfeiture. And the court said: "This is a suit upon a statute. In pleading a statute an exception in the general clause must be stated and negatived, so as to show that the party relying upon the general clause is not within the exception," citing the same cases that are

cited in the brief for the defendants in error, and all of which are to the same effect.

The defendants in error have never claimed to be embraced within the exceptions made in sections 2, 3, 4, or 5 of the act of March 2, 1889, and do not do so now, but merely suggest the possibility of such a thing, and seek to defeat the action by this mere suggestion of a possibility without ever having made a claim or effort to show themselves entitled to the benefit of any exception contained in the act. We may safely assume that if any such exception in his favor existed it would have been alleged and proved upon the trial of the cause, and, as was said by Mr. Justice McLean in *Ross* v. *Duvall* (13 Peters, 45, 61), "the rule is well settled that to avoid a statute a party must show himself to be within its exception."

II.

We further submit that as against a mere trespasser—a mere wrongdoer, who does not pretend to have any title or right of property or right of possession in the thing converted—an equitable, a voidable, or an imperfect title or right of possession is sufficient to maintain the action of trover, and such trespasser can not attack such title or right of possession in the plaintiff, nor will it avail the defendant in such action to establish title in a third person, unless he shows connection between himself and the third person, and claims the title, possession, or right of possession under such third person. (*Terry* v. *Meterier*, 104 Mich., 50; *Stevens* v. *Gordon*, 87 Maine,

564.) The latter case was an action in trover for the value of grass cut from a highway next to plaintiff's farm, and the court held that the title to the land as against a mere trespasser was not in dispute, but only the question of possession, and that mere possession was sufficient to maintain the trover against any person except the rightful owner, and that a mere trespasser could not defeat the action by setting up title in a third person, unless he could justify his acts by authority from such person. To the same effect see *Fisk* v. *Small*, 25 Maine, 453; *James* v. *Wood*, 82 Maine, 173, 177.

In the case of *Hallock* v. *Mixer* (16 Cal., 574, 579), per Mr. Justice Field, it was held that in an action of replevin for the value of timber severed from the real estate a mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. So, in *Wheeler* v. *Lawson* (103 N. Y., 40, 46), it was held that an action of trover could not be defeated by the defendant showing title in a third person, unless he so connect himself with that third person as to show possession or right of possession by the authority of such third person.

In the case of *Jeffries* v. *Great Western Railway Company* (5 El. & Bl., 802), which was an action of trover, the defendant having failed to make out any right in himself, sought to show that by an act of bankruptcy the title had passed to the assignees. Such proof was held to be inadmissible, and Lord Campbell, after stating the general principles of the action of trover, said:

> The presumption of law is that the person who has the possession has the property. Can that pre-

> sumption be rebutted by evidence that the property was in a third person when offered as a defense by one who admits that he himself had no title and was a wrongdoer when he converted the goods? I am of opinion that this can not be done.

See in accord *Bartlett* v. *Hoyt*, 29 N. H., 317; *Burke* v. *Savage*, 13 Allen, 408; *Magee* v. *Scott*, 9 Cush., 148; *Cook* v. *Patterson*, 35 Alabama, 102; Cooley on Torts, 444, 445.

The United States, of course, did not have possession of this land *pedis possessio*, but they did have the right to the immediate possession thereof, and right to immediate possession is sufficient to maintain the action of trover. Independently of the resumption of the legal title to this land by the forfeiture act of March 2, 1889, it is notoriously and concededly true that the ten-year limit of the condition subsequent contained in the original grant of 1856 had expired without the building of this railroad, and therefore at any time after 1866 the Government had the right to immediately take possession of this land either through judicial proceedings or by Congressional enactment. That it did not do so is entirely immaterial, for actual possession is not necessary to maintain an action of trover where one is entitled to the immediate possession. When, therefore, it is said, as is sometimes done in the cases, that the plaintiff in trover must have had at the time of the conversion the right to the property and also a right of possession, nothing more can be understood than this: that the right of which he complains he had been deprived must either have been a right actually in possession or a right to immediately take possession.

In an action of trover for the value of goods wrongfully converted by defendant to his own use, the plaintiff must always succeed if he should prove either way his own right to the immediate possession of the goods. If he should not prove such right he will fail. The property in the goods is that which most usually draws to it the right of possession, and so the right to maintain an action of trover is sometimes said to depend on the plaintiff's property in the goods, and the right of immediate possession is also sometimes called a special kind of property. But these expressions are misleading. The action of trover tries only the right to the immediate possession, which may, and very frequently does, exist independently from the property in the goods. (Darlington Per. Prop., 36, 37; Cooley on Torts, 445.) And this right to immediately take possession of the land from which the timber was cut in the case at bar, and to resume title thereto, is certainly sufficient to maintain an action of trover against a mere trespasser making no claim whatever either to the property or to the possession thereof.

It is not essential in an action of trover that the plaintiff should have the absolute title; it is enough if he stands in such relation to the property that he is entitled to assert an immediate right of possession; for in such cases the plaintiff will be ultimately liable to the true owner for the value of the article unless returned to him, and a judgment in favor of the plaintiff in such action will bar any subsequent suit by the true owner against the defendant. (*Gillett* v. *Fairchild*, 4 Denio., 80;

Wallis v. *Osteen*, 38 Ga., 250; *Hardy* v. *Reed*, 6 Cush., 252.)

In this case the United States was the equitable and beneficial owner of the land from which the timber was cut, even conceding that the act of March 2, 1889, did not relate back so as to give the legal title of this land to the Government at the date of the trespass and conversion, for as we have said, the ten-year limitation of the original act had expired without the building of this road, and the Government had a right at any time by judicial or legislative proceedings to resume the title to such land, and to enter into actual possession thereof. The State of Michigan had, if anything, nothing more then a dry naked title, which it held as a trustee for the United States, in trust for a certain specific purpose which had long since failed. Even this dry naked title she had attempted to reconvey to the United States, and the governor of the State had made a deed thereof to the United States. It is therefore seen that the State of Michigan, by every effort in its power, had endeavored to reconvey this dry naked title back to the General Government, and is not making any claim to the land in this controversy.

Conceding these efforts on the part of the State to have been beyond the scope of the authority of the legislature of that State and of its governor, and that they were ineffectual for the purposes for which they were intended, and that the dry legal title, notwithstanding such acts, still remained with the State of Michigan, certainly the right of property, the right of possession, the

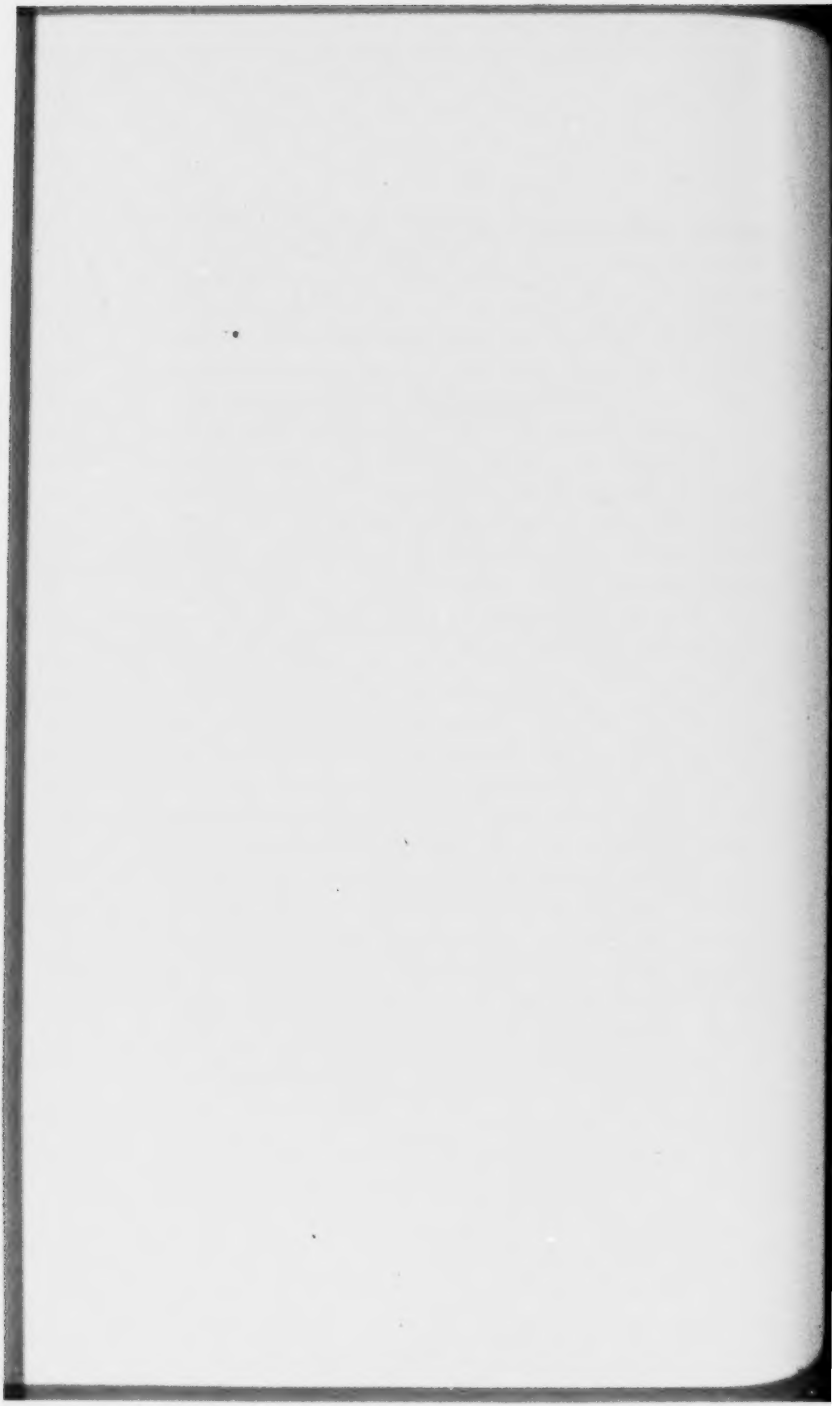
equitable title, was still in the United States, together with an immediate right to repossess itself of the naked legal title still outstanding in the State of Michigan. Against this title we have the willful depredation of a wrongful trespasser acknowledging the conversion of the lumber, and setting up in himself absolutely no right, title, claim, or interest of possession in or to the thing converted, but who seeks to deprive the real beneficial owner of the value of the thing thus unlawfully appropriated to his own use by technically asserting a mere naked title in the third person, without in any wise showing any claim under that third person, and the question before the court is whether or not such lawless despoilers of the public domain shall be thus permitted to deprive the Government of what is equitably and honestly its due.

If such a doctrine is to be upheld, then every acre of the public domain which has been in the past granted to the States or to corporations upon conditions subsequent, and which the slow-acting legislative or executive departments have not forfeited by appropriate proceedings, notwithstanding the failure of the conditions subsequent, are absolutely at the mercy of any vandal who chooses to strip the land of its most valuable possessions, and then evade all liability therefor by asserting a bare, naked title in someone else, without any claim of right under such person. It seems to us that the bare statement of such a doctrine should be its answer. It is therefore submitted that the decision of the learned court below was erroneous, and that the same should be

reversed, with instructions to enter a judgment in favor of the plaintiffs in error for the value of the lumber, as claimed in the petition and found in the agreed findings of fact.

JOHN K. RICHARDS,
Solicitor-General.

GEORGE HINES GORMAN,
Special Attorney.



SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

CHARLES LOUGHREY AND MILES H. WHEELER,
Defendants in Error.

ABSTRACT OF THE CASE.

Plaintiff sued defendants in error in trover for timber cut from the north half of the northwest quarter, the northwest quarter of the northeast quarter and the southeast quarter of Section Thirteen (13), Township Forty-four (44), North of range Thirty-five (35) West, in the State of Michigan.

Defendants in error being residents of the eastern district of Wisconsin, the suit was instituted in the United States Circuit Court for that district.

The summons was issued August 30, 1890.

The complaint charges the *cutting* of the timber by one Joseph E. Sauve. It charges him also with having removed from the lands, of the timber so cut, 80,000 feet and with having left skidded upon the lands the balance.

The defendants in error are charged as purchasers from Sauve.

The entire amount of timber cut by Sauve is alleged in the complaint to be 600,000 feet and the time of the cutting was alleged to have been in the winter of 1887-8 and prior to the 1st day of March, 1888.

The defendants in error by their answer, admit that they purchased from Sauve, about the time stated in the complaint, a quantity of timber in the log not to exceed 400,000 feet board measure, but allege that all of such timber was cut from the two descriptions of land first mentioned in the complaint, namely:—the north half of the northwest quarter and the northwest quarter of the northeast quarter of the section there named, and from the southeast quarter of the northeast quarter of the same section, instead of from the southeast quarter of said section as alleged in the complaint.

By stipulation the case was tried by the court without a jury, upon stipulated facts.

The facts stipulated are found in folios 6 to 9, pages 4 to 6, of the Transcript of Record.

The stipulation determines the descriptions of land from which the timber was cut to be as described in the answer and the amount cut to be 400,000 feet. It also fixes the value of the timber as stumpage, as logs upon the land, as logs upon the river and as manufactured, as data for determining the damages in case the court should determine the government was entitled to recover.

It was also stipulated that the cutting and taking of the timber was prior to March 1st, 1888, and was not a willful trespass: that none of the lands in question were ever owned or held as a homestead or earned by any railroad or other company under

the act of Congress of June 3, 1856, mentioned in the stipulation of facts, and that the history of the Ontonagon & State Line Railroad Grant marked Exhibit "A" (mentioned in third paragraph of stipulated facts, p. 6, Record) might be used as evidence as far as applicable to the case.

The main facts upon which the defense to the action is based are stated in the Fifth paragraph of stipulated facts, p. 5, Record, which reads as follows:—

> "Fifth;—That the lands above described "were a part of the Grant of Lands made "to the state of Michigan by an act of the "Congress of the United States, approved "June 3, 1856, being Chapter 44 of Volume "II, of the United States Statutes at large, "and that said lands were accepted by the "state of Michigan by an act of the Legis- "lature, approved February 14, 1857, be- "ing Public Act No. 126 of the Laws of "Michigan for that year, and were a part "of the lands of said Grant within the six "mile limit, so called, outside of the com- "mon limits, so called, certified and ap- "proved to said state by the Secretary of "the Interior, to aid in the construction of "the railroad mentioned in said Act No. "126 of the Laws of Michigan of 1857, to "run from Ontonagon to the Wisconsin "State Line, therein denominated "The "Ontonagon and State Line Railroad Com- "pany."

After the trial the court found the facts to be as stipulated: pp. 7 and 8, Record and, found as Conclusions of Law,

> "First:—That the cause of action sued

"on in this case did not, at the time of the "commencement of this action, and does "not now, belong to the United States of "America.

"Second:—That the defendants are en- "titled to judgment herein for the dismis- "sal of the complaint upon its merits."

The history of the Ontonagon & State Line Railroad Grant referred to in the thid paragraph of stipulation on page 6 of the Record, and there stipulated as evidence in the case, is not shown by the record. No bill of exceptions was settled in the case and what figure this history cut at the trial does not appear.

No exceptions were filed to the Court's Findings of Fact. Its Conclusions of Law and what it failed to find are excepted to, but no requests to find were made.

The trial court reached the conclusion that the cause of action sued on did not belong to the government and rendered judgment for the defendants, and the Court of Appeals affirmed the Judgment.

There was a mis-recital of fact in the printed brief for plaintiff in error in the Court of Appeals as follows:

"On February 22, 1867, the Legislature "of the state of Michigan passed a joint "resolution, (Mich. Laws, 1867, p. 613,) "surrendering the lands, and authorizing "the Governor to execute and file a cer- "tificate of non-incumbrance, and surren- "der the said lands to the United States."

It will be found upon examining the act of the legislature of Michigan above referred to that it

has no reference whatever to any of the lands composing any part of the grant to "The Ontonagon & State Line Railroad Company." The joint resolution there referred to has reference entirely to the grant to the "Marquette & State Line Railroad Company," an entirely different corporation. This was so held by this Court in the case of *Lake Superior Ship Canal R'y & Iron Co. v. Cunningham*, 155 U. S. 354, where the resolution is quoted as follows:

> "*Whereas*, by act of congress, ap-
> "proved June 3, 1856, there was made,
> "among other grants to this state, a grant
> "of land to aid in the construction of a rail-
> "road from Marquette to the Wisconsin
> "state line; and whereas, by joint resolu-
> "tion of congress, approved July fifth,
> "eighteen hundred and sixty-two, a change
> "of the route of said road was authorized,
> "and in fact has been made; and whereas,
> "the company have executed a release of
> "said land to the governor; therefore,
>
> "Resolved by the senate and house of
> "representatives of the state of Michigan,
> "that the governor be and is hereby au-
> "thorized to execute and file the certificate
> "of non-incumbrance and surrender to the
> "United States of the land on the original
> "line of said railroad, required by said
> "joint resolution."

Argument for Defendants.

The lands in question were a part of those granted by the Act of Congress of June 3, 1856, to the state of Michigan and accepted by that

state by the Act of the Legislature approved Feb'y 14, 1857, and were a part of the grant "within the six mile limit, so called, outside of the common limits, so called." approved to the state to aid in the construction of the railroad mentioned in the Act of Michigan above referred to to run from Ontonagon to the Wisconsin state line and denominated in said Act "The Ontonagon & State Line Railroad." Being such, they were, to that extent, in all respects in the same situation as those considered in the case of *Lake Superior Ship Canal Railway & Iron Co. v. Cunningham*, supra. That case contains a full history of that part of the grant of June 3, 1856.

Were it not for the Act of Congress of March 2, 1889, (25th Statutes at large, 1008) which declares a forfeiture of lands, with certain exceptions, co-terminous with the uncompleted portion of the railroad in aid of which the grant of 1856 was made, this case would be wholly controlled by *Schulenberg v. Harriman*, 21 Wall., 44, for the trespass complained of, having been committed prior to the 1st day of March, 1888, and while the title to the land was out of the government, the cause of action was not in the government. That case is exactly in point.

Nor would the act of March 2, 1889, if, it, instead of declaring forfeiture, as it does, of but a *portion* of the unearned lands of the Ontonagon Grant, had declared forfeiture of *all*, have invested the government with the cause of action for this trespass. It does not purport to do more than resume title *to the lands*. The cause of action for the trespass remained where it was at the time it accrued: *Cutts et al. v. Spring et al.*, 15 Mass., 134; *DePeyster v. Michael*, 6 N. Y.,

467–506. To use the words of the opinion in *Lake Superior Ship Canal R'y & Iron Co. v. Cunningham*, supra—page 112—

> "The first section simply declares a for-
> "feiture of the lands opposite to and co-
> "terminous with the uncompleted portion
> "of any railroad in aid of which the grant
> "of 1856 was made. So far as the parties
> "to this controversy are concerned, that is
> "the whole significance of the section.
> "As to them it grants nothing and with-
> "draws nothing. And as, at the time of
> "the passage of the act neither settler nor
> "company had any right or title to the
> "lands, if this were the only section it
> "would operate simply to resume the title
> "to the United States: clear the lands of
> "all pretense of adverse claims, and add
> "them to the public domain to be there-
> "after disposed of as other public lands
> "are disposed of. The second and third
> "sections are the troublesome parts of the
> "Act etc."

The title to the instant lands having by the Act of Congress of June 3, 1856, and Public Act No. 126 of the Laws of Michigan of 1857, vested in the State of Michigan, the government, since it founds its right to maintain this action upon the Forfeiture Act of Congress of March 2, 1889, a statute containing a general clause and exceptions, should have shown, both by its pleading and proof, that these lands were not a part of those excepted from the operation of the general clause. *McGlone et al. v. Prosser*, 21 Wis., 275; 1 Chitty's Pl. 223; *Vavasour v. Ormond*, 6 B. & C. 430 (13 E. C. L. 225); *Smith v. Moore* 6 Greenl., 227;

Ross et al. v. Duval et al., 13 Pet., 45; But it makes no attempt by its complaint to show this, and the stipulated facts do not cover all of the exceptions of the act.

But for aught that appears in the case, these lands were amongst those saved from the forfeiture by the second or third sections of the Act itself. The burden was on the plaintiff to show they were not. Title to the land and cause of action once appearing to be out of the government, to maintain this action it was incumbent upon the government to show itself reinvested with both. It has shown neither. Its sole reliance is the first section of the forfeiture act of 1889, and that section, as the act was construed in the Cunningham case, does not, necessarily, relate to these lands, They may, for aught that appears, be amongst those confirmed to adverse claimants by the 2nd or 3rd sections of the act. All that appears is

1st: They were never owned or held by any party as a homestead, and

2nd: They were never earned by any railroad or other company *Under the Act of Congress of June 3rd, 1856.*

These are not, however, the only exceptions. They may otherwise "have been heretofore disposed of by the proper officers of the United States or under selections in Michigan, confirmed by the Secretary of the Interior, under color of the public land laws." Sauve, who cut and sold the timber to defendants, may have had "a bona fide pre-emption claim on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States." In either case the Act of 1889, (Section

3) confirmed, instead of forfeited the title. This was so held in the Cunningham case.

W. H. WEBSTER,

Att'y for Defendants.

UNITED STATES *v.* LOUGHREY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 22. Argued and submitted April 21, 1898. — Decided December 12, 1898.

Under the act of June 3, 1856, c. 44, 11 Stat. 21, the State of Michigan took the fee of the lands thereby granted, to be thereafter identified, subject to a condition subsequent that, if the railroad, to aid in whose construction they were granted, should not be completed within ten years, the lands unsold should revert to the United States; but, until proceedings were taken by Congress to effect such reversion, the legal title to the lands and the ownership of the timber growing upon them remained in the State, and the United States could not maintain an action of trespass against a person unlawfully entering thereon, and cutting and removing timber from the land so granted: and timber so cut and separated from the soil was not the property of the United States, and did not become such after acquisition of the lands by reversion; and the United States could not avail themselves of the rule that in an action of trover, a mere trespasser cannot defeat the plaintiff's right to possession by showing a superior title in a third person, without showing himself in priority with, or connecting himself with such third person.

THIS was an action originally begun by the United States in the Circuit Court for the Eastern District of Wisconsin, to recover the value of timber cut from the north half of the northwest quarter of the northeast quarter of section thirteen, township forty-four north, of range thirty-five west, in the State of Michigan. The complaint charged the cutting of the timber by one Joseph E. Sauve, and that he removed from the lands 80,000 feet of timber so cut and left the balance

skidded upon the lands. The defendants were charged as purchasers from Sauve. The amount of timber cut by Sauve was alleged to have been 600,000 feet, and the time of the cutting in the winter of 1887–8 and prior to the first day of March, 1888.

The case was tried by the court without a jury upon facts stipulated as follows:

First. The defendants, prior to the first day of March, 1888, cut and removed from the north half ($\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$), and the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), and the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) of section thirteen (13), in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber, and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from said land was not a wilful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

Fourth. That the value of said timber shall be fixed as follows: That the value of the same upon the land or stumpage, at $2.50 per thousand, board measure; that the value of the same when cut and upon the land, $3.00 per thousand, board measure; that the value of the same when placed in the river was $5.00 per thousand, board measure; that the value of the same when manufactured was $7.00 per thousand, board measure.

Fifth. That the lands above described were a part of the grant of lands made to the State of Michigan by an act of the Congress of the United States, approved June 3, 1856, being chapter 44 of volume 11 of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature, approved February 14, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad men-

tioned in said act No. 126 of the laws of Michigan of 1857, to run from Ontonagon to the Wisconsin state line, therein denominated "The Ontonagon and State Line Railroad Company."

The finding of facts by the court was in accordance with the foregoing stipulation, with the additional finding that said railroad was never built and said grant of lands was never earned by the construction of any railroad.

And as conclusions of law, the court found:

First. That the cause of action sued on in this case did not, at the time of the commencement of this action, and does not now, belong to the United States of America.

Second. That the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

No exceptions were taken to the findings of fact, and no further requests to find were made. Exceptions were only taken to the conclusions of law found by the court, and for its failure to find other and contrary conclusions.

Upon writ of error sued out from the Circuit Court of Appeals, the judgment of the Circuit Court dismissing this complaint was affirmed. 34 U. S. App. 575.

Whereupon the United States sued out a writ of error from this court.

Mr. George Hines Gorman for plaintiffs in error. *Mr. Solicitor General* was on his brief.

Mr. W. H. Webster for defendants in error submitted on his brief.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

To entitle the plaintiff to recover in this action, which is substantially in trover, it is necessary to show a general or special property in the timber cut, and a right to the possession of the same at the commencement of the suit.

There is no question that the lands belonged to the United

States prior to June 3, 1856. By an act of Congress, passed upon that date, 11 Stat. 21, c. 44, it was enacted that "there be, and hereby is, granted to the State of Michigan, to aid in the construction of railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the two last named places to the Wisconsin state line," with others not necessary to be mentioned, "every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads; . . . which lands . . . shall be held by the State of Michigan for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for, and on account of each of said roads: *Provided, further*, That the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which said lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." By the third section it was enacted that the "said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other." Provision was made in the fourth section for a sale of the lands for the benefit of the railroads as they were constructed. The last clause provided that "if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States."

1. Under this act the State of Michigan took the fee of the lands to be thereafter identified, subject to a condition subsequent that if the roads were not completed within ten years the lands unsold should revert to the United States. With respect to this class of estates Professor Washburn says that "so long as the estate in fee remains, the owner in possession has all the rights in respect to it, which he would have if tenant in fee simple, unless it be so limited that there is properly a reversionary right in another — something more than a possibility of reverter belonging to a third person, when, perhaps, chancery might interpose to prevent waste of the prem-

ises." 1 Wash. Real Prop. 5th ed. 95. As was said in *De Peyster* v. *Michael*, 6 N. Y. 467, 506, a right of reëntry "is not a reversion, nor is it the possibility of reversion, *nor is it any estate in the land.* It is a mere right or chose in action, and, if enforced, the grantor would be in by a forfeiture of a condition, and not by a reverter. . . . It is only by statute that the assignee of the lessor can reënter for condition broken. But the statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other *estate.* . . . When property is held on condition, *all the attributes and incidents of absolute property belong to it until the condition be broken.*" Had the State through its agents cut timber upon these lands, an action would have lain by the United States upon the covenant of the State that the lands should be held for railway purposes only, and devoted to no other use or purpose; but the State was not responsible for the unauthorized acts of a mere trespasser, and it was no violation of its covenant that another person had stripped the lands of its timber.

In the case of *Schulenberg* v. *Harriman*, 21 Wall. 44, an act immediately preceding this, granting public lands to the State of Wisconsin to aid in the construction of railroads in that State, and precisely similar to this act in its terms, was construed by this court as a grant *in præsenti* of title to the odd sections designated, to be afterwards located; that when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the lands. As it is stipulated in this case that the lands from which the timber was cut were a part of the grant of June 3, 1856, to the State of Michigan, and were a part of the lands within the six-mile limit, certified and approved to the State by the Secretary of the Interior, no question arises with respect to the identity of the lands.

The case of *Schulenberg* v. *Harriman* was also an action for timber cut upon lands granted to the State, against an agent of the State who had seized the logs, which had been cut after the ten years had expired for the construction of the railroad, but before any action had been taken by Congress

to forfeit the grant. The complaint in the case alleged property and right of possession in the plaintiffs. It was stipulated by the parties that the plaintiffs were in the quiet and peaceable possession of the logs at the time of their seizure by the defendants, and that such possession should be conclusive evidence of title in the plaintiffs against evidence of title in a stranger, unless the defendant should connect himself with such title by agency, or authority in himself. The title of the plaintiffs was not otherwise stated. It was held that the title to the lands did not revert to the United States after the expiration of the ten years, in the absence of judicial proceedings in the nature of an inquest of office, or a legislative forfeiture, and that until a forfeiture had taken place the lands themselves and the timber cut from them were the property of the State. Said Mr. Justice Field, in delivering the opinion of the court, p. 64: "The title to the land remaining in the State, the lumber cut upon the land belonged to the State. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property." The same rule regarding the construction of this identical land grant was applied by this court in *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 354. Indeed, the principle is too well settled to require the citation of authorities. The case of *Schulenberg* v. *Harriman*, 21 Wall. 44, differs from the one under consideration in the fact that no act forfeiting the grant was ever passed; but it is pertinent as showing that under a statute precisely like the present the title to the timber cut before such forfeiture is in the State and not in the General Government.

It follows that the United States, having no title to the lands at the time of the trespass and no right to the possession of the timber, are in no position to maintain this suit. Neither a deed of land nor an assignment of a patent for an

invention carries with it a right of action for prior trespasses or infringements. Such rights of action are, it is true, now assignable by the statutes of most of the States, but they only pass with a conveyance of the property itself where the language is clear and explicit to that effect. 1 Chitty on Pleading, 68; *Gardner* v. *Adams*, 12 Wend. 297, 299; *Clark* v. *Wilson*, 103 Mass. 219, 223; *Moore* v. *Marsh*, 7 Wall. 515; *Dibble* v. *Augur*, 7 Blatchf. 86; *Merriam* v. *Smith*, 11 Fed. Rep. 588; *May* v. *Juneau County*, 30 Fed. Rep. 241; *Kaolatype Engraving Company* v. *Hoke*, 30 Fed. Rep. 444.

So where a landowner entrusts another with the possession of his lands, either by lease, by contract to sell, or otherwise, the right of action for trespasses committed during such tenancy belongs to the latter, and except under special circumstances an action for a trespass, such as the cutting of timber, will not lie in favor of the landlord. *Greber* v. *Kleckner*, 2 Penn. St. 289; *Campbell* v. *Arnold*, 1 Johns. 511; *Tobey* v. *Webster*, 3 Johns. 468; *Cutts* v. *Spring*, 15 Mass. 135; *Lienow* v. *Ritchie*, 8 Pick. 235; *Ward* v. *Macauley*, 4 T. R. 489; *Revett* v. *Brown*, 5 Bing. 7; *Harper* v. *Charlesworth*, 4 B. & C. 574; *Graham* v. *Peat*, 1 East, 244; *Lunt* v. *Brown*, 13 Maine, 236; 2 Greenlf. on Ev. § 616.

Although, as was said by Lord Kenyon in *Ward* v. *Macauley*, 4 T. R. 489, "the distinction between the actions of trespass and trover is well settled: The former are founded on possession; the latter on property;" yet, they are concurrent remedies to the extent that, wherever trespass will lie for the unlawful taking and conversion of personal property, trover may also be maintained. The plaintiff is bound to prove a right of possession in himself *at the time of the conversion*, and if the goods are shown to be in the lawful possession of another by lease or similar contract, he cannot maintain trover for them. *Smith* v. *Plomer*, 15 East, 607; *Wheeler* v. *Train*, 3 Pick. 255; *Gordon* v. *Harper*, 7 T. R. 9; *Ayer* v. *Bartlett*, 9 Pick. 156; *Fairbank* v. *Phelps*, 22 Pick. 535.

It does not aid the plaintiffs' case to take the position (the soundness of which we by no means concede) that the State held the lands as trustee, to deliver them over to the railroads

upon certain contingencies, and to return them to the United States in case the condition subsequent were not performed, since nothing is better settled than that a trustee has the legal title to the lands, and that actions at law for trespasses must be brought by him, and by him alone. 1 Perry on Trusts, sec. 328, and cases cited; *Fenn* v. *Holmes*, 21 How. 481.

Certain cases having a contrary bearing will now be considered. Several of these are to the effect that if a man leases an estate for a term of years and the tenant unlawfully cuts timber the lessor may sue in trespass, and perhaps in trover, upon the ground that the title to the land remains in the lessor during the pendency of the lease.

In *Richard Liford's case*, 11 Coke Rep. 46, which was an action of trespass by a tenant against the agent of the owner of the inheritance for certain trees cut, it was said "that when a man demises his land for life or years the lessee has but a particular interest in the trees, but the general interest of the trees remains in the lessor; for the lessee shall have the mast and fruit of the trees, and shadow for his cattle, etc., but the interest of the body of the trees is in the lessor as parcel of his inheritance; and this appears in 29 H. 8 Dyer, 36, where it is held in express words that it cannot be denied that the property of great trees, *scil.* the timber, is reserved by the law to the lessor, but he cannot grant it without the termor's license, for the termor has an interest in it, *scil.* to have the mast and fruit growing upon it, and the loppings thereof for fuel, but the very property of the tree is in the lessor as annexed to his inheritance." Again, speaking of disseisin and the respective rights of the disseisee and disseisor when the former regains possession, it is said: "That after the regress of the disseisee the law adjudges as to the disseisor himself, that the freehold has continued in the disseisee, which rule and reason doth extend as well to corn as to trees or grass, etc. The same law, if the feoffee, or lessee, or the second disseisor, sows the land, or cuts down trees or grass, and severs, and carries away, or sells them to another, yet after the regress of the disseisee, he may take as well the corn as the trees and grass to what place soever they are carried; for the regress

of the disseisee has relation as to the property, to continue the freehold against them all in the disseisee *ab initio*, and the carrying them out of the land cannot alter the property."

In *Gordon* v. *Harper*, 7 T. R. 9, it was held that where goods had been leased as furniture with a house, and had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against the sheriff, pending the lease, because he did not have the right of possession as well as the right of property at the time. The case was distinguished from one where the thing was attached to the freehold, and the doctrine of *Liford's case* was reiterated, that where timber is cut down by a tenant for years the owner of the inheritance may maintain trover for the timber notwithstanding the lease, because the interest of the lessee in it remained no longer than while it was growing on the premises and determined instantly when it was cut down. See also *Mears* v. *London & Southern Railway*, 11 C. B. [N. S.] 850; *Randall* v. *Cleaveland*, 6 Conn. 328; *Elliot* v. *Smith*, 2 N. H. 430; *Starr* v. *Jackson*, 11 Mass. 519.

These cases obviously have no application to one where there has been a conveyance of the fee of the land prior to the cutting of the timber, and no reëntry or analogous proceeding on the part of the vendor for a breach of a condition subsequent.

The same distinction was taken in *Farrant* v. *Thompson*, 5 B. & Ald. 826, in which certain mill machinery, together with the mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized under execution by the sheriff and sold by him. It was held that no property passed to the vendee, and the landlord was entitled to bring trover for the machinery, even during the continuance of the term, upon the ground that the machinery attached to the mill was a part of the inheritance which the tenant had a right to use, but not to sever or remove.

So in *United States* v. *Cook*, 19 Wall. 591, it was held that timber standing upon lands, occupied by Indians, cannot be cut by them for the purposes of sale, although it may be for

the purpose of improving the land, as the Indians had only the right of occupancy, and the presumption was against their authority to cut and sell the timber. In such case the property in the timber does not pass from the United States by severance, and they may maintain an action for unlawful cutting and carrying it away. To the same effect is *Wooden Ware Co.* v. *United States*, 106 U. S. 432.

In *Wilson* v. *Hoffman*, 93 Michigan, 72, the same principle was extended to a plaintiff in ejectment who was held entitled to maintain an action for trover for logs cut by the defendant during the pendency of the suit which had been determined in the plaintiff's favor, although the defendant was in possession of the land under a *bona fide* claim of title adverse to the plaintiff. This is but another application of the doctrine which allows the plaintiff in ejectment to recover mesne profits upon the theory that the land has always been his, and that the defendant illegally obtained possession of it. See also *Morgan* v. *Varick*, 8 Wend. 587; *Busch* v. *Nester*, 62 Michigan, 381; 70 Michigan, 525.

In *Mooers* v. *Wait*, 3 Wend. 104, a person entered into possession of wild lands under a contract of sale giving him the right of entry and occupancy, reserving to the landlord the land as security until the payment of the consideration by withholding the deed. It was held that he had a right to enter and enjoy the land for agricultural purposes, but that he had no right to cut timber for any other purpose than for the cultivation, improvement and enjoyment of the land as a farm; and that the owner of the inheritance, who had never parted with his title, might maintain an action of trover for it against any one in possession, although a *bona fide* purchaser under the occupant. This was also upon the principle that the vendor had never parted with title to his land. But see *Scott* v. *Wharton*, 2 Hen. & M. 25; *Moses* v. *Johnson*, 88 Alabama, 517.

In *Burnett* v. *Thompson*, 6 Jones, N. C. (Law), 210, the plaintiff had a life estate *pur autre vie* in a lease of Indian lands for ninety-nine years, and also a reversion after the expiration of the term. A stranger entered and cut down

cypress trees and carried them off. The plaintiff was permitted to recover. It was held that "if there be a tenant for years or for life, and a stranger cuts down a tree, the particular tenant may bring trespass, and recover damages for breaking his close, treading down his grass, and the like. But the remainderman, or reversioner in fee, is entitled to the tree, and if it be converted may bring trover and recover its value. The reason is, the tree constituted a part of the land, its severance was waste, which is an injury to the inheritance, consequently the party in whom is vested the first estate of inheritance, whether in fee simple or fee tail (for it may last always), is entitled to the tree, as well after it is severed, as before; his right of property not being lost by the wrongful acts of severance by which it is converted into a personal chattel." See also *Halleck* v. *Mixer*, 16 California, 574.

While these cases run counter to some of those previously cited, they are all distinguishable from the one under consideration in the fact that the plaintiff was the owner of the inheritance, and had the legal title to the land at the time the trespass was committed. We see nothing in them to disturb the doctrine announced by this court in *Schulenberg* v. *Harriman*, 21 Wall. 44, that timber cut upon the lands prior to the forfeiture belongs to the State. The fact is that nothing remained of the original title of the United States but the possibility of a reversion, a contingent remainder, which would be an insufficient basis for an action of trover. *Gordon* v. *Lowther*, 75 N. C. 193; *Matthews* v. *Hudson*, 81 Georgia, 120; *Farabow* v. *Green*, 108 N. C. 339; *Sager* v. *Galloway*, 113 Penn. St. 500. To sustain this action there must be an immediate right of possession when the timber is cut. This might arise if the severance of the timber involved a breach of obligation on the part of the tenant, but if the timber were cut by a third person, the question would be as to the right to the timber so cut as against the trespasser, and unless the case of *Schulenberg* v. *Harriman* is to be overruled, it must be held to be that of the State.

2. As the United States can take title to the timber in-

volved in this case only through its ownership of the lands, it remains to consider whether the act of March 2, 1889, c. 414, 25 Stat. 1008, forfeiting the lands granted by this act to aid in the construction of a railroad from Marquette to Ontonagon, operated by relation to revest in the United States title to the timber which had been cut during the winter of 1887 and 1888, and prior to the act of forfeiture. This act provided that "there is hereby forfeited to the United States, and the United States hereby resumes title thereto, all lands heretofore granted to the State of Michigan . . . which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain."

The position of the plaintiffs must necessarily be that this act of forfeiture not only revested in the United States the title to the lands as of a date prior to the cutting of the timber in question, but also revested them with the property in the timber which had been cut while the lands belonged to the State of Michigan. Had this act of forfeiture not been passed, there could be no question that, under the case of *Schulenberg* v. *Harriman*, 21 Wall. 44, this timber would have belonged to the State of Michigan, and no action therefor could have been brought by the United States.

But conceding all that is contended for by the plaintiffs with respect to the revestiture of the title to the lands by this act, it does not follow that the title to the timber which had been cut in the meantime was also revested in the United States. As was said in *Schulenberg* v. *Harriman*, the title to the timber remained in the State after it had been severed. But it remained in the State as a separate and independent piece of property, and if the State had elected to sell it, a good title would have thereby passed to the purchaser, notwithstanding the subsequent act of forfeiture. It did not remain the property of the State as a part of the lands, but as a distinct piece of property, although the State took its title thereto through and in consequence of its title to the lands. From the moment it was cut, the State was at liberty to deal with

it as with any other piece of personal property. *Robert* v. *Hurdle*, 48 N. C. 490.

We know of no principle of law under which it can be said that timber, which was the property of the State when cut, becomes the property of the United States by an act of Congress resuming title to the land from which it was cut, although the timber may in the meantime have been removed hundreds of miles from the lands, and passed into the hands of one who knew nothing of the source from which it was derived. It may be, in such a case, that if the State sues for and recovers the value of such timber, it might be accountable to the United States for the proceeds, in case the Government resumed title to the lands.

Two cases cited by the Solicitor General in the brief lend support to the doctrine that the resumption of title by the United States operates upon the timber already cut as well as upon the lands. In the first of these, *Heath* v. *Ross*, 12 Johns. 140, the action was in trover for a quantity of timber cut upon lands for which the plaintiff had applied for a patent before the timber was cut. The patent was not granted until after the timber was cut. The patent was held, upon well-settled principles, to relate back to the date of application. The defendant knew he had no title to the lot or right to cut the timber. The plaintiffs were held entitled to recover.

The other case is that of *Musser* v. *McRae*, 44 Minnesota, 343. In that case an act of Congress, granting lands to the State of Wisconsin in aid of the construction of railroads, provided that it should be lawful for the agents appointed by the railway company, entitled to the grant, to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States, "deficiency" lands within certain indemnity limits. It was *held* that the issuance of a patent to the railway company for the lands so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States at the date of the selection. And it was further held that where, after the lands had been so selected, but prior to the issue of the patent,

timber had been wrongfully cut and removed by trespassers, the title acquired by the patents must be held to relate back to the selection of the lands, so as to save the purchasers to whom the lands had been granted, a right of action for the timber wrongfully removed from the land, or its value.

These cases are distinguishable from the one under consideration in the fact that the plaintiffs had an inchoate title to the lands — a title which no one could disturb, and which the State was bound to perfect by the issue of a patent, provided the plaintiffs followed up their application. We do not think the doctrine of these cases ought to be extended.

3. Nor are the plaintiffs entitled to avail themselves of the rule that in an action of trover a mere trespasser cannot defeat the plaintiff's right to possession by showing a superior title in a third person without showing himself in privity or connecting himself with such third person. The cases in which this principle is applied are confined to those where the plaintiffs were either in possession of the property or entitled to its immediate possession, and thus showed a *prima facie* right thereto. It has no application to cases wherein the plaintiff has shown no such right to bring the action. *Jeffries* v. *Great Western Railway Co.*, 5 El. & Bl. 802; *Weymouth* v. *Chicago & Northwestern Railway*, 17 Wisconsin, 567; *Wheeler* v. *Lawson*, 103 N. Y. 40; *Halleck* v. *Mixer*, 16 California, 574; *Terry* v. *Metevier*, 104 Michigan, 50; *Stevens* v. *Gordon*, 87 Maine, 564; *Fiske* v. *Small*, 25 Maine, 453. Counsel are mistaken in supposing that the plaintiffs had an immediate right to the possession of this timber. They had no right to the possession of the land until Congress passed the act of March 2, 1889, forfeiting the grant. Up to that time the title was in the State, and until then the United States had no more right to enter and take possession than they would have had to take possession of the property of a private individual.

As the plaintiffs failed to show title to or right of possession to the timber in question, there was no error in the action of the Court of Appeals, and its judgment is therefore

Affirmed.

Dissenting Opinion: White, J., Fuller, C.J., Harlan, J.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER and MR. JUSTICE HARLAN, dissenting.

The United States donated the land from which the timber was cut to the State of Michigan in aid of a contemplated railroad. The donating act dedicated the property thus conveyed to the State, for the sole purpose of aiding in the construction of the railroad, and it contained a provision that if the road was not built within a designated period the land conveyed was to revert to the United States. The road was never built, and the granted land was forfeited by act of Congress, because of non-compliance with the conditions contained in the grant.

The issue presented for decision is the right of the United States to recover in an action of trover the proceeds of timber cut from the land by a trespasser whilst the legal title was in the State, but after the period had elapsed when the right in the United States to assert a forfeiture had arisen. The decision of the court is that a recovery cannot be had, because at the time of the severance of the timber by the trespasser the legal title was in the State. It is thus in effect decided that it was in the power of a trespasser, while the legal title to the land and its incidents was in the State, to destroy the value of the land by severing and appropriating the timber, and that there exists no remedy by which the right of property of the United States can be protected. Such a consequence strikes me as so abnormal that I cannot bring my mind to assent to its correctness; and thinking as I do that it involves a grave denial of a right of property, not only harmful in the case decided, but harmful as a precedent for cases which may arise in the future, I state the reasons for my dissent.

At the outset it becomes necessary to determine the nature of the rights of the State and those of the United States created by and flowing from the act of donation. That the land from which the timber was cut belonged to the United States at the time of the grant goes without saying. It was conveyed by the act of Congress to the State, not for the use and bene-

fit of the State, but for the sole purpose of aiding in the construction of a railroad. The State had no right to dispose of the land except for the declared object; and whilst it is true that a power to sell the land was vested by the act in the State, it was a power which the State could only call into being as the work progressed, and, to quote from the act, "for the purposes aforesaid and no other" — that is, the specific object stated, namely, the construction of the railroad referred to. The granting act clearly imported that in the event of a forfeiture before the land had been earned and conveyed by the State, the land should be restored to the United States in its integrity.

I submit that the effect of the act of Congress was to create a trust in the land and to vest the legal title thereto, with the incidents such as timber, in the State of Michigan for the purposes of the trust, to hold, primarily, for the benefit of the owners of a line of railroad if constructed, and, secondarily, for the benefit of the United States, in the contingency that a forfeiture was declared for a breach of the condition subsequent as to the time of completion of the road. The State, in all reason, was bound to restore the land and timber which passed to its possession to the United States, upon the declaration of the forfeiture, retaining no benefit whatever from the land for itself by reason of such custody and control. Being clothed with the legal estate in the land, the State, while it so held the land, "possessed all the power and dominion over it that belonged to an owner." *Stanley* v. *Colt*, 5 Wall. 119, 167. As the timber when severed belonged to the true owner of the land, the State, as the trustee of an express trust and representing such owner, was the proper party, during the continuance of the trust, to recover any portion of the inheritance wrongfully converted by a trespasser, and this would have been the case even if the United States had stipulated to retain possession until a conveyance of the land by the State. *Wooderman* v. *Baldock*, 8 Taunt. 676; *White* v. *Morris*, 11 C. B. 1015; *Barker* v. *Furlong*, (1891) L. R. 2 Ch. 172; *Myers* v. *Hale*, 22 Mo. App. 204. Clearly this was so, because, to maintain replevin or trover, it is essential that the plaintiff

have *at the time of suit brought* the legal title to the property, and, until the enactment of the forfeiting act, the legal title to this timber was in the State of Michigan.

It was manifestly because the legal title was in the State that this court in *Schulenberg* v. *Harriman*, 21 Wall. 44, declared that a State was the owner of timber which had been wrongfully cut by trespassers from land granted in aid of a railroad by a statute similar to the one above referred to. The Schulenberg action was instituted, however, at a time when no forfeiture had been declared, and the controversy was simply between a trespasser and the State as to their respective rights in timber which had been unlawfully severed from the granted land. That land so conveyed, with all that formed part thereof, was deemed to be held upon trust is manifest from the opinion; for, speaking through Mr. Justice Field, the court said (p. 59):

"The acts of Congress made it a condition precedent to the conveyance by the State of any other lands that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, the road not having been constructed, could pass any title to the company."

And this view was reiterated by this court, speaking through Mr. Justice Brewer, in *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 354, when, in interpreting the very statute now under consideration, it was said (p. 373):

"Further the grant to the State of Michigan was to aid in the construction of a railroad. Affirmatively, it was declared in the acts of Congress that the lands should be applied by the State to no other purpose. Even if there had been no such declaration such a limitation would be implied from the declaration of Congress that it was granted for the given purpose. As the State of Michigan had no power to appropriate these lands to any other purpose, certainly no act of any executive officer of the State could accomplish that which the State itself had no power to do."

To reason, however, to establish that in so far as the granting act restricted the State to the use of the land and that

which adhered in it for a particular purpose it engendered an express trust, is wholly unnecessary, since it is admitted that had the State through its agents cut timber upon the land before the passage of the forfeiture act, a right of action would have arisen on behalf of the United States against the State as upon a covenant by the State that it would keep the land and its incidents for railway purposes only. This conclusion necessarily carries with it as a legal resultant the proposition that the granting act contained an express trust. How then, I submit, can it in reason be held that there was a right which could only exist upon the hypothesis of an express trust arising from the granting act, and yet it at the same time be decided that there was no trust whatever implied in the act, or that the rights which would obtain if there were a trust have no being? It cannot be doubted that the act restricted the use to a particular purpose, nor can it be gainsaid that the right of reëntry was stipulated only as respects the non-completion of the railroad. But the failure to preserve a right of reëntry in case of the misuse of the property did not destroy the terms of the act restricting the use, and as therefore the restriction as to use was unaccompanied with a clause of reëntry, the effect was to give rise to a trust upon the grantee with reference to such use. This last principle, I submit, is sustained by authority. *Stanley* v. *Colt*, 5 Wall. 119, 165; *Packard* v. *Ames*, 16 Gray, 327, and cases cited; *Sohier* v. *Trinity Church*, 109 Mass. 119.

As the State held the land with power simply to sell on the happening of a particular event, until the occurrence of that event the State had no greater rights in the land than would have existed in favor of one who was entitled to the mere use and occupancy of the land. It could not therefore sell the timber for purposes of mere profit, for, as said in *United States* v. *Cook*, 19 Wall. 591:

"The timber while standing is a part of the realty and can only be sold as the land could be. The land cannot be sold, . . . consequently the timber, until rightfully severed, cannot be."

If, therefore, the State could not rightfully acquire the

absolute ownership, in its own right, of timber, the cutting of which it had authorized, it is clear that it would not become such owner by reason of the unlawful act of an unauthorized person. As the State of Michigan was without power to have authorized a sale of the timber contrary to the purpose of the trust, it is obvious that the act of a mere trespasser, without authority from the State, in denuding the land of its timber, could not operate to vest the State or the trespasser with the absolute ownership, in its or his own right, of said timber; and it is the settled doctrine of this court that the sale of timber by a trespasser does not divest the title of the real owner, and that a purchaser, even though acting in good faith, is liable to respond to the true owner for the timber or its value. *United States* v. *Cook*, 19 Wall. 591; *Wooden Ware Co.* v. *United States*, 106 U. S. 432; *Stone* v. *United States*, 167 U. S. 178, 192, 195.

The simple question presented then is this and this alone: Where the legal title to land, with its incidents, is in one person burdened with an express trust in favor of another, can the *cestui que trust*, upon the cessation of the trust, when the title to the land and its incidents has revested in him, recover from a wrongdoer the value of timber cut, without color of right and unlawfully removed from the land while the legal title and possession thereto was in the trustee?

This question is, I think, fully answered by the rulings of this court in *Schulenberg* v. *Harriman* and *Lake Superior &c. Co.* v. *Cunningham*, *supra*, because, as already stated, in the first case it was said that "no conveyance in violation of the terms of these acts, the road not having been constructed, could pass any title to a grantee of the State;" and in the second, that, "As the State of Michigan had no power to appropriate these lands to any other purpose, certainly no act of any executive officer of the State could accomplish that which the State itself had no power to do." Now, no one will gainsay that this court in those cases declared that if the land was conveyed in violation of the terms of the act of Congress, an occupant under such an unlawful grant might be ousted by the United States, either forcibly

or by suit in ejectment. With this doctrine thus settled by this court in opinions which are now approvingly cited, is it yet to be held that if the occupant under a void grant from the State before forfeiture denuded the land of all its timber, that is, of one of its material incidents, the land might be recovered by the United States from the trespasser, but not the timber or its value? I submit that, upon general considerations, as between the wrongdoer and the *cestui que trust*, the better right is in the latter, that such right can be enforced, and that though ordinarily in an action of trover it is essential that the plaintiff should have had at the time of the unlawful conversion the legal title and right of possession to the property claimed by him, yet, under such circumstances as I have indicated, a title by relation is a sufficient basis for the action.

Relation is a fiction of law, adopted solely for the purposes of justice, *Gibson* v. *Chouteau*, 13 Wall. 92, 100, and by it one who equitably should be so entitled is enabled to assert a remedy for an injury suffered, which otherwise would go unredressed. The doctrine is considered at much length in *Butler* v. *Baker*, 3 Coke, 25, in resolutions of the Justices of England and the Barons of the Exchequer, and "many notable rules and cases of relations" (p. 35*b*) are there stated. The action was trespass, and the refusal of a wife, after the death of the husband, to accept a jointure by which an estate tail had vested in her prior to the death of the husband, was held to relate back as to certain lands and not as to others. It was laid down (p. 28*b*) "that relation is a fiction of law to make a nullity of a thing *ab initio* (to a certain intent), which *in rei veritate* had essence, and the rather for necessity, *ut res magis valeat quam pereat*." And, in Lord Coke's comments on the case, he observes (p. 30*a*): "The law will never make any fiction, but for necessity, and in avoidance of a mischief."

Early in England the doctrine of relation was applied in favor of the king in cases where until office found the title or right of possession to property, real or personal, was not in the crown. Thus Viner in the eighteenth volume of his Abridgment, at p. 292, title Relations, states the following case:

"2. In *quare impedit*, where the king is entitled to the

advowson by office by death of his tenant, the heir being within age and in ward of the king by tenure in capite, this office shall have relation to the death of the tenant of the king; so that if there be a mesne presentment the king shall avoid it by relation. (Br. Relations, pl. II, cites 14 H. 7, 22.)"

Several instances of the application of the doctrine in favor of the king are referred to at length in the report of the case of *Nichols* v. *Nichols*, Plowden, 477, 488 *et seq.*, one of which, I submit, is precisely parallel to the case at bar, and is thus stated in the report:

"In an action of trespass brought in 19 Edw. IV, for entering into a close and taking the grass, the defendant pleaded that it was found by office that the tenement escheated to the king before the day of the trespass, and there it seems that, as to such things as arise from the land, as the grass, and the like, the action which was well given to the plaintiff was taken away by the office found afterwards, which by its relation entitled the king thereto; but, as to the entry into the land, or breaking of fences, which don't arise from the land, nor any part of the annual *en*crease of it, the action was not taken away by the office."

This last case is reviewed, approvingly, in the opinion of Bayley, J., in *Harper* v. *Charlesworth*, 4 B. & C. 574, where, in an action of trespass, brought by one in the possession of lands under a parol license from agents of the crown, which possession was not good as against the crown because not granted in conformity to statute, it was adjudged that, as the king had not proceeded against the occupant, the action might be maintained, though the right of such occupant to recover for the trees was denied in the opinion of Holroyd, J., presumably because they form part of the inheritance.

The doctrine was early enforced in England to vest a right of action, in trover, in an administrator. In 18 Viner's Abr., title Relation, p. 285, it is said:

"(1. If a man dies possessed of certain goods, and after a stranger takes them and converts them to his own use, and then administration is granted to J. S., this administration shall relate back to the death of the testator, so that J. S.

may maintain an action of trover and conversion for this conversion before the administration granted to him. Trin. 10 Car. B. R. between Locksmith and Creswell adjudged, this being moved in arrest of judgment, after verdict for the plaintiff. Intratur. Hill, 9 Car. Rot. 729.)"

In the marginal note it is stated: "For this is to punish an unlawful act; but relations shall never divest any right legally vested in another between the death of the intestate and the commission of administration."

An administrator has likewise been held, by relation, to have such constructive right of possession in the goods of the intestate before grant of letters as to be entitled to maintain an action of trespass. *Tharpe* v. *Stallwood*, 5 M. & G. 760, and cases there cited. And, in *Foster* v. *Bates*, 12 M. & W. 226, Parke, B., said (p. 233):

"It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrongdoer who has seised or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas, in the case of *Tharpe* v. *Stallwood*, 12 Law J. N. S. 241, (a) where an action of trespass was held to be maintainable. The reason for this relation given by Rolle, C. J., in *Long* v. *Hebb*, Styles, 341, is, that otherwise there would be no remedy for the wrong done."

The title of an assignee in bankruptcy was also early held to relate back, for the purpose of maintaining trover, to the time of the commission of the act of bankruptcy. See the subject reviewed in *Balme* v. *Hutton*, 9 Bing. 471, particularly pp. 524, 525, where Tindal, C. J., observed that in *Brassey* v. *Dawson*, 2 Str. 978, Lord Hardwicke, then Chief Justice of the King's Bench, stated this relation to be a fiction of law, but that, subsequently, when Chancellor, in *Billon* v. *Hyde*, 2 Ves. 310, he seemed to be of opinion that the terms of the bankrupt act, by necessary construction, imported that such relation was intended.

Another illustration of the application of the doctrine is

where a grantee or mortgagee ratifies an unauthorized delivery of a conveyance or mortgage to a third person, in which case it is held that the title may relate back to the unauthorized delivery, except as to vested rights of third persons. See a review of numerous authorities in *Rogers* v. *Heads Iron Foundry*, 51 Nebraska, 39. See, also, *Wilson* v. *Hoffman*, 93 Michigan, 72, where it was held that a successful plaintiff in ejectment might maintain an action of trover for logs cut by the defendant from standing timber, and removed from the land during the pendency of the suit, and while in possession of the land under a *bona fide* claim of title adverse to the plaintiff. In that case the court said (p. 75):

"In the present case the true owner brings trover against the party who cut the logs, under a *bona fide* claim of title adverse to the owner, after the title to the land has been determined in favor of the plaintiff. . . . If in the present case the logs had been upon the land when the ejectment suit was determined, that determination would have established the title in the plaintiff. Suppose, however, that before the determination of the ejectment suit the logs had been skidded upon adjoining land — would the ownership or right of possession depend upon which party first reached the skids? As is said in the *Busch case*, as between the wrongdoer and the true owner of the land, the title to what is severed from the freehold is not changed by the severance, whatever may be the case as to strangers. If the true owner may keep his own property when he gets it, why may not he get it if another has it?"

Many decisions of this and other courts illustrate the application of the doctrine to various conditions of fact. Thus, where one has claimed land under a donation act, or has entered upon land under homestead or preëmption statutes, the legal title subsequently acquired by patent has been held to relate back to a prior period, to quote the language of this court in *Gibson* v. *Chouteau*, 13 Wall. 100: "So far as it is necessary to protect the rights of the claimant to the land, and the rights of parties deriving their interests from him."

Among the cases recognizing and applying the doctrine

that the legal title when acquired may be held, for certain purposes, to relate back to the inception of an inchoate right in the land, which, however, was in no sense an estate in the land, may be cited the following: *Ross* v. *Barland*, 1 Pet. 655; *Landes* v. *Brant*, 10 How. 348; *Lessee of French* v. *Spencer*, 21 How. 228, 240; *Grisar* v. *McDowell*, 6 Wall. 363; *Beard* v. *Federy*, 3 Wall. 478; *Lynch* v. *Bernal*, 9 Wall. 315; *Stark* v. *Starrs*, 6 Wall. 402; *Gibson* v. *Chouteau*, 13 Wall. 92, 100; *Shepley* v. *Cowan*, 91 U. S. 330; *Heath* v. *Ross*, 12 Johns. 140; and *Musser* v. *McRae*, 44 Minnesota, 343. As was said in *Gibson* v. *Chouteau*, *supra*, p. 101, the doctrine of relation is "usually" applied in this class of cases, but is so applied "for the purposes of justice." I submit it is clear that the inchoate rights in land held in the cases above cited to be sufficient to warrant the application of the doctrine of relation were of no greater legal or equitable merit or efficacy than the interest or expectant right in land with its incidents, reserved to the United States by virtue of the granting act of 1856 here considered, and this it strikes me is patent when it is borne in mind that it is conceded that the interest of the United States in the land was such that, if the timber had been cut by the State, the United States had the better right to the avails, and might, by an action for breach of covenant, recover the same from the State. But, if the State, which held the legal title subject to an express trust, can be held to account by way of damages in an action of covenant for timber cut under its authority, why "for the purposes of justice" should not the doctrine of relation be applied in favor of the United States, at this time when, otherwise, a naked trespasser, who had no title of any kind and whom the State whilst it was trustee choose not to sue and cannot now sue, will escape liability and the United States be defrauded of the value of its property? To deny relief under such a state of facts is, I submit, to hold that if A conveys land in fee to B in trust, to be held for C until the happening of a certain event, and, after the contingency has happened, and the land has been conveyed to C and the trust thus terminated, the former *cestui que trust* discovers that the land had been stripped of all its timber

by a trespasser and rendered practically valueless, he is without remedy, and must endure the pecuniary injury without complaint.

If, as it seems to me is clearly the fact, the State of Michigan held title to the timber merely as an incident to the land, and could only exercise such powers with respect to the timber as it was entitled to exercise as respects the land itself, it results that the State did not stand in the attitude of a grantee of land upon condition subsequent, to whom an *absolute* conveyance had been made, *for its sole use and benefit.* Authorities, therefore, to the point that in the case of *such* a conveyance, the only right of the grantor is to receive back, upon reëntry, the granted land in the condition in which it might then exist, have no pertinency in a case like the present, where the grant was to the State, not as absolute owner, but as a mere trustee. So, also, I submit that decisions which hold that upon the commission of a trespass on land where the legal title and possession is in the real owner, or upon an infringement of a patent the legal title to which is in the real owner, a right of action to recover damages for the trespass or infringement immediately vests in such owner and becomes personal to him, so as not to pass upon a subsequent conveyance of the land or assignment of the patent, have no relevancy in cases like that at bar, where at the time of the trespass or infringement complained of the legal title and the possession was held by one who was but a trustee for another, and had no real, beneficial interest in the land.

Nor can I see the appositeness of the citation of authorities holding that, during the existence of a trust, the trustee and not the *cestui que trust* is the proper person to sue. This is readily conceded, and such was the decision of this court in *Schulenberg* v. *Harriman* and in *Lake Superior &c. Co.* v. *Cunningham.* The question here is, not who may sue during the existence of the trust, but, what are the rights of the *cestui que trust* when the power of the trustee has ended, and the property has reverted under the terms of the trust.

The decisions are uniform, that even where land is in the possession of a lessee, upon an unauthorized severance of

growing timber, the title and right of possession to the severed timber is at once vested in the owner of the land, or, as it is sometimes expressed, the owner of the inheritance; and the latter may resort to the appropriate remedies against one who unlawfully removes the severed timber from the land, *Liford's case*, 11 Coke Rep. 46*b*, 48*a*; *Ward* v. *Andrews*, 2 Chitty, 636; *S.C.* 4 Kent Com. 120; *United States* v. *Cook*, 19 Wall. 591, 594; *Burnett* v. *Thompson*, 6 Jones, Law, (N. C.) 210, 213; *Mather* v. *Ministers of Trinity Church*, 3 Serg. & Raw. 509, and cases cited; *Mooers* v. *Wait*, 3 Wend. 104, 108; *Gordon* v. *Harper*, 7 T. R. 13; 1 Chitty Plead. 16th ed. 217; star paging 168; 1 Wash. Real Prop. 5th ed., 498, note *T*, star paging 314; and the same principle applies to whatever is part of the inheritance and is wrongfully severed and removed from the land. *Farrant* v. *Thompson*, 5 B. & Ald. 826, 828.

To summarize, therefore: The State of Michigan was not the beneficial owner of the land from which the timber in question was severed, but held the legal title merely as a trustee, though, by virtue of being vested with the legal estate, the State was entitled to enforce, for the benefit of the real owner, such remedies as the latter might have resorted to had he held the legal title. But if the owner, the United States, is not permitted to maintain the present action, it loses property which it had a clear right to receive, and the wrongdoer goes unpunished. These circumstances present all the elements which justify resort to the fiction of law by which a person who, in equity and good conscience, was the real owner at the time of an unlawful conversion is to be regarded, as against the wrongdoer, to have had the legal title and possession, by relation, in him at the time of such conversion, and therefore as having had such a title and possession as, when his disability to assert his rights no longer exists, will entitle him to maintain an action of trover.

Indeed, it seems to me that in reason it is impossible to deny the right of the true owner to recover the timber, without involving the mind in irreconcilable propositions and in addition making use of a complete *non sequitur*, that is to say, first, that there was no trust, and yet that rights existed

which could only arise by reason of a trust; and second, that the trustee alone could sue during the existence of the trust, therefore, on the termination of the trust, the same doctrine applies. Reduced to its last analysis, the doctrine now announced is, I submit, really this: That the United States could not recover whilst the trust existed because the trustee must assert the right, and that it likewise could not recover after the termination of the trust, and, hence, could not recover at all. The result in effect concedes the existence of a right of property, but holds that it cannot be protected because the law affords no remedy. The maxim *ubi jus, ibi remedium* lies at the very foundation of all systems of law, and, because, as has been stated at the outset, I cannot believe that the common law departs from it, I refrain from giving my assent to the conclusions of the court, and express my reasons for dissenting therefrom.